121-201

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 159.

JAMES D. McCONIHAY, TRUSTEE, ET AL., APPELLANTS,

vs.

THEODORE WRIGHT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED OCTOBER 12, 1883.

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1 Pleas before the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, held at Charleston on Friday, the 24th day of August, A. D. 1883, and in the 108th year of the Independence of the United States of America.

Be it remembered that heretofore, to wit, at chambers in Parkersburg, West Virginia, before the Honorable John J. Jackson, judge of said court, on the 24th day of September, 1881.

THEODORE WRIGHT *vs.* J. D. MCCONIHAY *et al.* } In Chancery. In Chambers, at Parkersburg, W. Va.

Upon this 24th of Sept., 1881, Theodore Wright, the complainant in the above cause, presented his bill to the judge of this court at chambers, which having been read is ordered to be filed, and at the same time moved the court to award him an injunction for reasons set out in the bill. And it appearing to the court that there
2 is reason for immediate action in the matter to prevent irreparable loss and damage the court is of opinion to award said injunction, and doth hereby grant the same, restraining and inhibiting James D. McConihay and all other defendants mentioned in the bill from in anywise interfering with the rights of the complainant to use and enjoy the property set out and described in the bill in any manner he may see proper to do; and the defendants, each and all of them, are restrained and inhibited from instituting any legal proceedings of any kind or character whatever in the courts of the State of West Virginia to recover the possession of the property or in anywise interfere with the use of the same by the complainant until the further order of the court; but before this injunction shall take effect the complainant or some responsible person for him must enter into bond, with good security, in the sum of $3,000, conditioned according to law.

This bond may be executed before any judge of the United States court or before any commissioner of the United States court, and leave is given to all the defendants to file their answers as soon
3 as may be to litigate the questions presented by the bill or for the dissolution of this injunction.

Endorsed: ("J. J. Jackson, judge D. C. U. S., D. W. Va.").
Teste: JASPER Y. MOORE, *Clerk*.

Which bill is in the words and figures following, to wit:

District Court of the United States for the District of West Virginia.

To the judge of said court:

Theodore Wright, of Philadelphia, in the State of Pennsylvania, and a citizen of said State, brings this his bill against—

James D. McConihay, trustee & in his own right, a citizen and resident of Kanawha county, West Virginia.

Wm. R. McConihay, a citzen and resident of the same county and State.

Mary J. Shrewsbury and Dickinson Shrewsbury, her husband, citizens & residents of the same State and county.

Sallie L. Goshorn (widow), citizen and resident of the same county and State.

Felix G. McConihay, citizen and resident of the same county and State.

4 John H. McConihay, citizen and resident of the same county and State.

Annie E. Cabell and her husband, Robert W. Cabell, citizens and residents of the same county and State.

Ella C. Anderson and her husband, John Anderson, citizens and residents of the same county and State.

James McConihay, John McConihay, Samuel McConihay, Mary S. Smith (children of Samuel McConihay, deceased), and C. B. Smith, husband of said Mary, citizens and residents of the same county and State.

John McConihay, Mary Ellen McConihay, Mattie McConihay, and Minnie McConihay (children of Ira McConihay, deceased), and citizens of West Virginia.

Daniel S. McConihay, citizen and resident of Boone county, West Virginia.

Fannie E. Dabney and —— Dabney, her husband, citizen- and resident- of the State of West Virginia.

And thereupon plaintiff complains and says that in a certain suit pending in this honorable court in which Henry A. Cram is plaintiff and E. A. Bibby *et als.* are defendants a certain decree of sale was entered on the 16th day of November, 1880, which

5 ordered the sale of [a] large tract of land held in the name of Henry A. Cram in trust for himself and others, together with the road-bed and right of way to the Kanawha river and river front property on said river, which land, road-bed, right of way, & river front had been acquired by said Cram under a judicial sale made to said Cram under a decree in a chancery suit in the circuit court of Kanawha Co., W. Va., of the Bank of Virginia *versus* Winifrede Mining and Manufacturing Co. *et als.*, the said road-bed, right of way, and river front having been long before that time acquired by the Winifrede Mining and Manufacturing Company by condemnation of the same in the manner required by law. Under the decree in the cause of Cram *vs.* Bibby *et als.* your orator purchased said land, road-bed, right of way, river front, &c., &c. The sale was duly confirmed by this honorable court, your orator having fully complied with the terms of sale thereof. By this means your orator acquired good and valid title to said land, road-bed, right of way, river front, &c.

Your orator files herewith as part of this bill a copy of the decree of sale in Cram *vs.* Bibby *et als.*, which decree is marked

6 Wright *vs.* McConihay, Exhibit No. 1, and also a copy of the decree of confirmation marked Wright *vs.* McConihay, Exhibit No. 2.

Your orator declares that he purchased this land on account of its value as a coal property, & one large element of its value was the fact that by the roadway and river depot which had been acquired & there seemed to be no obstruction to an immediate use & enjoyment of said property, and that your orator could at once improve & use the property. Your orator accordingly associated with him certain wealthy & energetic business men in Philadelphia, and arranged for the formation of two companies, one a mining company and the other a railroad company, each of which have subscribed $150,000 capital, & the parties purposing to from the railroad company have actually paid in $150,000 cash capital. Your orator has purchased $30,000 worth of steel rails, a large quantity of other material for the construction of the railroad, has employed engineers, surveyors, laborers, & skilled mechanics, & begun the work of improvement, has cut the poles & was about to put up a telephone from the river to the mines, and is now engaged in the repair & rebuilding of the houses left upon the place by the Winifrede Mining & Manufacturing Co., and made all preparations to put the whole property in the best possible situation for mining and shipping coal in large quantities which a judicious use of money, experience, & enegy could accomplish. They had scarcely begun their operations on the property when the following notice was posted on the fence at the entrance to that portion of the way which lies between the Chesapeake & Ohio railway and the river. It is filed herewith marked Exhibit No. 3, Wright *vs.* McConihay.

7

Your orator states at this point that the way and river depot sold to your orator as aforesaid and alluded to in the notice aforesaid was acquired by the Winifrede Co. by condemnation from the property of John McConihay, then living, now deceased. John McConihay, before his death, executed & acknowledged for record a somewhat singular deed, which now stands recorded, and a copy of which is herewith filed as part of this bill, marked Wright *vs.* McConihay, Exhibit No. 4. By this deed it will appear that the said McConihay vested his estate in James D. McConihay in trust for certain children and grandchildren, and with peculiar powers & duties attached to said trust; the children and grandchildren named in said deed are also named in the caption to this bill, and in addition thereto is named John H. McConihay, who is son of John McConihay, deceased, but was not included among the beneficiaries of said trust. The parties so named in said trust deed with John H. McConihay, the son as aforesaid, are the true heirs of said John McConihay, deceased.

8

Your orator is advised by Col. T. B. Swann, who has been counsel in the two causes above named of B'k of Va. *vs.* Winifrede Co. and Cram *vs.* Bibby, & as attorney for said Cram has been in charge of the property since the purchase by Mr. Cram in 1866, that Mr. Cram has had actual possession of the way & the river depot between the C. & O. R'way & the Kanawha river all the time, & the present occupant of a house on said river depot is the tenant of Mr. Cram, and

your orator claims this possession as his under the purchase aforesaid, & purposes to exercise his rights accordingly.

Your orator can only conjecture what rights the McConihay heirs claim in this way & depot. and need not venture to mention what is mere conjecture. He alleges that the land was duly con-
9 demned, the damages assessed; that John McConihay, pending an appeal of the condemnation proceedings, took judgment against the Winifrede Mining & Manufacturing Co. for the damages allowed; that he was a party to the suit of Bank of Virginia *v.* Winifrede Mining & Manufacturing Co., and set up & claimed this judgment; that the decree of sale in the cause allowed the judgment as the first lien on all the property of the W. M. & M. Co.; that the final decree in said cause (said McConihay being a party) declares in effect that this claim has been paid & orders a deed to the purchaser, Henry A. Cram, and your orator alleges that the judgment was paid.

Your orator also alleges that Henry A. Cram, as he is advised, has had possession of said way & depot more than ten years under his purchase & deed, and has supposed that the title he has acquired to said way & depot was undisputed & indisputable. It is evident from this notice that the McConihay heirs claim title to said way & depot in spite of these facts.

Your orator had no thought of buying a lawsuit in making this purchase; he bought in good faith, intending to make what
10 had long been an idle, useless property a thriving place of active industry & business, yielding, as he hoped, to himself & his associates a substantial profit and furnishing a new & large source of income to the people of Kanawha county.

He has been greatly annoyed by this unlooked-for & apparently unjustifiable interference with his operations, & his associates, to his great mortification, have been disgusted with the outlook, when they had taken hold of it with alacity & enthusiasm & have paid in their $150,000.00, cash, before even the Co.'s could be incorporated & organized, & stand ready to pay in the $150,000 capital of the mining company at any moment it is required. If your orator has not acquired title to the way & depot and it cannot be secured for him, he under no circumstances wants the property & claims that he would be entitled to claim a rescission of the sale, & the return of his money with damages, interest, &c.; but if he has really acquired the title to the property, as he believes that he has, he is anxious to retain the property, but wishes to be held harmless if he proceeds in his work.

If your orator proceeds with his work & expends a large sum in his road & equipment and in his mining plant, and then finds
11 that he is cut off from the Kanawha river, the damage would be serious. The material he has already purchased, if planted as a railroad, becomes second-hand material at once & could only be sold at a large discount from present value. It is plain, as your orator alleges, that he is threatened with irreparable damages if he goes on with his work & awaits the pleasure of the McConihay heirs to begin a suit against him for said way & depot & to disclose their

grounds upon which they claim title, and, having thus asserted their title, they ought to be required either to set it up or abandon it before your orator has gone so far as to mulct him in irreparable damage if they should be successful.

Your orator claims, if these parties have any good claim of title, they ought to be required to set it up at once, and not wait until your orator has made such large expenditures that they can hope to force him to unreasonable terms. Your orator desired to pay most, if not all, of the purchase-money down, & thus save the interest, but, as matters now stand, he does not feel safe in paying this purchase-money until these matters are settled, & he is thus
12 mulcted in the daily interest on $120,000.00 while thus delayed in his operations. The claim of title is provocation of a multiplicity of suits. Every act of your orator in connection with this property, every entry thereon by himself or his employees, may be made the foundation for a suit of trespass, as the same is threatened in said notice.

There are also many persons interested in the matter. It may be a question whether, if these parties had a title to this way & depot, it was included in this deed of trust; but, whether included in the deed or not, there are some 24 persons interested in the property, each having an undivided interest, and each or any or all or part can or may institute proceedings as they choose. The claim is a cloud upon your orator's title, which, if he purposes to use the property, he ought to be able to have removed, and your orator has a right to be quieted in his title, and appeals especially to this court for relief, from which he obtained his title.

Your orator cannot tell in what way or by whom an attack may be made upon him in this matter, and for that reason also especially claims the interference & protection of this court, and as the
13 vendee of the court he seeks the jurisdiction of this court to maintain his rights.

Your orator thus being threatened with suits, whether injunctions or prosecutions or suits at law, or any or all, he cannot tell, being liable under said threats if he exercises his rights of ownership to a multiplicity of suits from a multiplicity of individuals, being in danger of irreparable damage if these matters are not promptly settled, & being entitled to have this cloud upon his title removed, doth, because he fears all these things, appeal to this court for relief, being without adequate remedy therefor at law.

Although your orator has spoken hereinabove of having associated other parties with him, he has as yet made no conveyance of his interest in the Winifrede property, or any part thereof, to them, but holds the same still in his own right.

Your orator has been advised that some of these defendants probably do and will disclaim all title to said way and depot and disown the action of the parties who have given the notice aforesaid, but of this he has no certain assurance.

Your orator in bringing this suit in nowise waives or prejudices any of his rights as purchaser of the court, but strictly ad-

14 heres to and claims the same, and insists that this suit is brought for a proper assertion of his rights.

Your orator therefore prays that the parties named in the caption of this bill as defendants thereto may be required to answer this bill, and assert and declare such rights & title as they claim & under which the notice aforesaid was given, & any & all right or title which *this* claim to the way and depot aforesaid, in such a manner as will enable this court either to decide the same in person or by issue directed out of chancery, as to your honor may seem right & proper, and that they may be repuired to declare & say & do such things and bring into court such papers as may enable the court to take such action as will bring the questions arising under their claim to a speedy decision, so far as they are able so to do.

And if any of the parties defendants aforesaid disclaim such title to said way & depot that they may be required either to answer this bill & so disclaim or to assert their right as hereinabove required.

That the said defendants—any, each, & all of them—may be enjoined & restrained from asking or obtaining from any judge
15 of the State of West Virginia, or from any court of said State, any injunction against your orator, or his agents & employees, intended to affect or restrict your orator in the use, occupation, and enjoyment of said way & depot, or his operations & action in connection with said way & depot, until the further order of this court.

That the said defendants, any, each, & all of them, may be enjoined & restrained from bringing any suits against your orator, his agents or employees, in any of the State courts of West Virginia for any act of your orator, his agent or employees, in connection with such way & depot, and from interfering with or hindering or obstructing your orator, his agents and employees, in any manner in his use & enjoyment of said way & depot until the further order of said court, and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require and to this honorable court may seem meet.

And may it please your honor to grant unto your orator a writ of subpœna of the United States of America issuing out of and under the seal of this honorable court directed to the said defend-
16 ants above named as follows:

James D. McConihay, as trustee and in his own right; Wm. R. McConihay, Mary J. Shrewsbury & Dickinson Shrewsbury, her husband; Sallie L. Goshorn (widow), Felix G. McConihay, John H. McConihay, Annie E. Cabell & her husband, Robert W. Cabell; Ella C. Anderson & her husband, John Anderson; James McConihay, John McConihay, Samuel McConihay, Mary S. Smith (children of Samuel McConihay, dec'd), and C. B. Smith, husband of said Mary; John McConihay, Mary Ellen McConihay, Mattie McConihay, & Minnie McConihay (children of Ira McConihay, dec'd); Daniel S. McConihay, Fannie E. Dabney, & — Dabney, her husband, commanding them on a day certain therein to be named and under a certain penalty to be & appear in this honorable court, then & there to answer all and singular the premises and to stand to, perform, &

abide such farther order, direction, & decree as may be made against them.

And your orator, as in duty bound, will ever pray, &c.

THEODORE WRIGHT,
By SMITH & KNIGHT,
His Counsel.
SMITH & KNIGHT, *Sol's.*

UNITED STATES OF AMERICA, *District of West Virginia,* } *To wit:*

17 Theodore Wright, being duly sworn, deposeth & saith that he is the complainant in the foregoing bill named and has read the same & knows the contents thereof; that the said bill is true of his own knowledge, except as to those matters which are therein stated to be on his information & belief, and as to those he believes it to be true.

THEODORE WRIGHT.

Sworn to before me this 21st day of September, 1881.

ISAAC N. SMITH,
Notary Public in & for the County of Kanawha & State of West Virginia.

Exhibit No. 1, referred to in the foregoing bill, is in the words and figures following, to wit:

At a district court of the United States for the district of West Virginia, held at Charleston November 16th, 1880.

HENRY A. CRAM, Complainant,
vs.
E. A. BIBBY & Others, Defendants. } In Chancery.

Process having been duly served, in person or by publication, upon all the parties defendant to this cause named in complainant's bill and amended bills filed in this cause, this cause
18 came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was adjudged, ordered, and decreed as follows, viz:

That the legal title to the tract of 10,180 acres of land, more or less, situated on Field's creek and Big Cole river, West Virginia, and in the bill and amended bills more particularly described, together with the road-bed and right of way from the same to the Kanawha river, including the front property, all of which is hereinafter decreed to be sold, is vested in the complainant, Henry A. Cram, and that the said Henry A. Cram holds the same in trust to sell the same and pay over the net proceeds thereof to himself and the other parties interested in the same, according to their several respective interests, after discharging all just costs, charges, and advances accrued and accruing in the care and management of the said property and the sale of the same; that the schedule annexed to the bill and forming part of the same is a true and accurate statement of

the several interests in the said premises at the time the said premises were conveyed to the said complainant, *and* in the month of March, 1871, and that the said parties mentioned in the said
19 schedule were the only parties having any interest in the said premises or having any claim to the said premises, and that their proportionate respective interests at that time were as in the said schedule set forth, to wit, as follows:

E. H. Miller	6,539
W. R. Travers	4,196
J. C. McAndrew	4,241
The estate of Alexander Gillespie	2,405
The estate of Richard Oakley	1,301
Henry A. Oakley	350
The estate of John Lowry (John A. Lowry, ex'r)	1,362
E. A. Van Antwerp	481
J. E. Develin	328
E. A. Bibby	500
N. Dane Ellingwood	4,207
Henry A. Cram	34,786
G. S. Bibby	3,698
W. H. Bibby	2,436
John Gillespie	550
John P. Crosby (Frederick Oakley, administrator)	6,000
The estate of Wm. May (Geo. H. Foster, adm'r)	984
John Deuvreux	574
John R. Garland	481
Henry Engle	438
James Brand	300
J. C. McAndrew, in trust	7,363
George J. Miller	481
Total	84,001

And the court is further of the opinion that the said tract of land cannot be advantageously divided according to the various interests of the parties interested in the same, but that the said tract should be sold and the proceeds thereof divided among them as aforesaid.

And it is further adjudged, ordered, and decreed that there
20 is now justly due and owing to the said complainant the sum of nine thousand three hundred and sixty-one dollars and eighty-four cents ($9,361.84) for disbursements necessarily incurred and made by him in the care and management of the said property; and twelve thousand (12,000) dollars for compensation for the care and management of said property, being together the sum of twenty-one thousand three hundred and sixty-one dollars and eighty-four cents ($21,361.84), with interest from the twenty-fourth day of October, 1879, together with the further sum of two hundred (200) dollars, with interest from the 5th day of October, 1880, together with the costs of this suit, including attorney's fee of $20; that the said several sums together are a charge upon the said premises and make

and constitute a first lien upon the said premises, to be preferred to all other claims to or interest in the said premises and to be paid out of the first money arising from the sale or disposition of the said premises, and that the said premises are liable to be sold for the payment of the said lien and charge, and unless the said several sums of money, with the interest thereon, as hereinbefore set forth, are fully paid unto the said complainant within ninety days from the rising of this court, then it is further adjudged, ordered, and decreed that Thomas
21 B. Swann, Thomas L. Brown, Isaac N. Smith, and Harry Spencer Cram, who are hereby appointed special commissioners for that purpose, shall, after giving forty days' notice of the time, place, and terms of sale in some newspaper printed in Kanawha county, proceed to sell said land, together with the road-bed and right of way to the Kanawha river and river front property on the said river, at the front door of the court-house of Kanawha county, West Virginia. And before selling said land said commissioners are ordered to have the same laid off into four parts or parcels, as they may determine and decide to be most expedient, but in making the said division of the said land the commissioners shall cause that part of the said tract of land which lies in the county of Boone to be laid off separately and to form by itself one of the four parcels of land aforesaid. And the said commissioners shall cause the remainder of said land, lying in the county of Kanawha, to be laid off into three other convenient parcels, making in all the four tracts into which the same is ordered to be divided, and for
22 the purpose of the said division of the said land into four parts, as aforesaid, said commissioners are hereby empowered and authorized to select a competent surveyor and send him upon the said tract of land to divide the same as aforesaid, at the costs of this suit, and when said partition shall have been made by said surveyor he shall return and file with the records of this cause a report and plat of the same, upon which said several tracts of land shall be distinctly laid down, and the said land shall be sold separately in the said four lots or parcels as divided; the said sale to be made at public auction to the highest bidder, and the said roadway shall be sold with the parcels to which its several portions shall be respectively contiguous or adjacent, but the use of the said roadway shall be common to all four parcels.

And it is further ordered, adjudged, and decreed that the complainant herein, and each and every of the other parties to this cause shall be at liberty to bid or purchase at the said sale, and that the said sale be made on the following terms, to wit: 30% of the purchase-money in cash at the time of the sale, and the residue
23 in three equal payments at six and twelve and eighteen months, bearing interest from date of sale, and for the deferred payments the purchaser is required to give bond with good personal security, the deed or deeds to be withheld until full payment is made, and leave is given to any purchaser to anticipate the payments, and upon full payment being made to receive his deed without further delay.

And it is further ordered that said commissioners shall, with all convenient speed, after the sale shall have taken place, report the proceedings at the said sale and the result of the same. And liberty is reserved to the purchaser or purchasers under this decree to apply to the judge of this court at chambers, in vacation, for confirmation of any purchase made under this decree, after giving ten days' notice to all the counsel of record in this cause of the time and place at which said confirmation will be asked for.

A true copy from the records.

Teste:

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

Exhibit No. 2, referred to in the foregoing bill, is in the
24 words and figures following, to wit:

In the District Court of the United States for the District of West Virginia. July 30, 1881.

HENRY A. CRAM
vs.
E. A. BIBBY & Others. } In Chancery.

The commissioners appointed in this cause, Henry S. Cram, Thomas B. Swann, Thomas L. Brown, and Isaac N. Smith, this day appeared before the judge of this court in chambers, in vacation, at Parkersburg, West Virginia, and presented their report of sale in this cause, from which report it appears that at the sale made by them on June 29th, 1881, David Ward was the highest bidder for said property on that day, and had complied with the terms of sale.

And at the same time said commissioners presented a notice which had been served upon all the attorneys of record, as required in the decree of sale, notifying said commissioners and said attorneys that on this day, the 30th of July, 1881, he, the said Ward, would "move the Hon. J. J. Jackson, judge of the district court of the United States for the district of West Virginia," at the chambers of
25 said judge, "at Parkersburgh, West Virginia," to confirm the sale made by said commissioners on the 29th day of June, 1881. And the said David Ward being present in person and by his counsel, Wm. A. Quarrier, the said commissioners tendered their report and moved to file the same, and there being no objection thereto the same is done accordingly.

And it appearing to the court from inspection of said report that after the sale aforesaid to said Ward, one Theodore Wright made an advanced bid of ten per cent. over the bid of said Ward and complied with the terms of sale by depositing with the commissioners the cash payment and bonds as required by the terms of sale, which advanced bid the commissioners in their report recommend should be accepted and the biddings opened, and the said Theodore Wright being also present in person at the hearing of the motion of said Ward:

This cause came on to be further heard upon the proceedings heretofore had therein upon the report of said commissioners upon

the motion of said David Ward, duly served as required by the decree of sale aforesaid, and was argued by counsel for parties concerned therein. Upon consideration of all which the court is
26 of opinion that the biddings should be opened, as recommended by the commissioners, upon the advanced bid of said Wright. And the parties bidding, Theodore Wright and David Ward, both being present, and all the counsel of record being present, and no one objecting thereto, the biddings were opened in the presence of the court, and the biddings for said property were advanced by said David Ward and Theodore Wright, each one bidding alternately, until a bid was made by said Wright at a price per acre which amounted to the sum of $120,000.00; and the said Ward having then openly declared that he would make no further bid the sale was accordingly made to the said Theodore Wright for that price, being 12,754 acres at the rate of $9.408,812+ per acre, together with the road-bed down Field's creek to the Kanawha river and the loading depot at the Kanawha river, and all and every right and appurtenance in anywise pertaining thereto and subject to the surface rights of certain parts described in the map accompanying said report, which report and map is to be recorded with the deed hereinafter ordered, said sale being made by the acre, as heretofore decreed to be made, but for convenience of parties bids having been
27 received by the court in gross, and the said Wright having duly complied with the terms of said sale by the payment of thirty-six thousand dollars in cash and the execution of three notes under seal, each dated July 30th, 1881, with good security and as required by said decree of sale, the court is of opinion that said sale ought to be confirmed, and the counsel of the parties to the record being present, and no one objecting thereto, it is adjudged, ordered, and decreed that said sale be confirmed to said Wright as a sale by the acre at the price of $120,000.00.

And it appearing to the court that one of the commissioners aforesaid, Henry S. Crain, is a non-resident of this State, it is ordered that in the collection and disbursement of the funds arising from this sale the three commissioners resident in West Virginia, namely, Thomas B. Swann, Thomas L. Brown, and Isaac N. Smith, are hereby authorized to act without uniting the said Henry S. Crain with them, and may sign all checks and execute all receipts or other papers in that connection as may be necessary, and the acts of said three resident commissioners in this behalf shall have the same effect as if they were done by all four of them.

28 And, as heretofore ordered in this cause, the said Theodore Wright may, within ninety days from this date, if he so desires, test the accuracy of the survey made by order of the commissioners aforesaid and filed with their report, and if any error has been made therein which the said Wright desires to have corrected, he may take the steps for that purpose which are authorized in the decree heretofore entered in that behalf; but no correction of any error in the survey or in the estimate of the quantity of land sold shall be made unless action shall be taken to that end within said period of ninety days; and it is further declared and decreed

that this sale is confirmed according to the map and report of the property made by Abel P. Sinnett and filed with the report of said commissioners, and so as to include all the rights of way, loading depots, &c., formerly owned by the Winifrede Mining Company, and subject to the surface rights of certain parts described in said report and map of said Sinnett. And the said commissioners, or the three resident commissioners aforesaid, are hereby directed to return to David Ward the cash payment and the bonds made by him and delivered to said commissioners, and they are also directed to collect from time to time, as they mature, the bonds of
29 said Wright, and to disburse the cash on hand and such collections as they may hereafter make to the parties entitled there under the decree aforesaid, first paying all the costs of this suit and of this sale, and liberty is given to said Wright to pay the bonds, or any one, or any part of any one, before maturity, if he so desires. Such payments made in the distribution of the fund shall be made to the attorneys representing the different interests therein; and it appearing to the court that the said commissioners have conducted this sale with great advantage to the parties interested, and with much more active and diligent effort and labor than is customary, all of which has enured to the benefit of the parties, the court is of opinion and doth decree that they shall be allowed five per cent. commission upon the gross amount at which the property has been sold, and upon payment in full of all the purchase-money by the purchaser, Isaac N. Smith, who is hereby appointed special commissioner for that purpose, shall make, execute, acknowledge for record, and deliver a good and sufficient deed, as required by law, specifying with particularity the metes and bounds of the land afore-
30 said and of the surface rights aforesaid and of the rights of way and depots and landings aforesaid, as far as practicable, to which deed a copy of the map of the property as made by said Sinnett shall be attached as part thereof, for which service he shall be allowed the sum of fifty dollars, to be taxed in the costs of this suit and paid as such; and it appearing to the court that the counsel who have conducted this cause, namely, Mess. Thos. B. Swann, Thomas L. Brown, and Isaac N. Smith, have done so in the interest of all the parties to the cause, and the following parties have not employed counsel, but have shared in the benefits of their labors, namely, John Gillaspie, estate of Wm. May, E. A. Van Antwerp, J. E. Develin, James Bland, estate of Alex. Gillaspie, John Devreux, John R. Garland, Henry Engle, George J. Miller, it is therefore ordered that unless arrangements are made by these parties which are satisfactory to said counsel the said counsel shall be entitled to a compensation of ten per cent. commission upon the amounts which shall be found to be payable to said parties in interest, and they are authorized to retain the same in making payments to these parties.

It is further ordered that Thos. B. Swann be paid the sum
31 of 100 dollars out of the present cash payment in hand as his regular yearly retainer from said Cram until the day of sale.

Teste: JASPER Y. MOORE, *Clerk.*

August 4, 1881.

H. A. CRAM
vs. } In Chancery.
E. A. BIBBY & Others.

It being represented to this court that the taxes upon the lands sold in this cause for 1880 & 1881 are returned and not paid, the court doth order Commissioners Smith, Cram, Brown, and Swann, out of any money in their hands to the credit of this cause, to pay the same into the treasury of the State of West Va., taking proper vouchers therefor.

Aug. 4, '81.

(Signed) JACKSON, *Judge.*

Test: JASPER Y. MOORE.

"Exhibit No. 3," referred to in the foregoing bill, is in the words and figures following, to wit:

To Theodore Wright, Esq.:

Yourself and your agents and your employees are hereby notified that we, trustees for the heirs of John McConihay, dec'd, claim and own the parcel of land lying between the C. & O. R. W., Field's creek, and the Kanawha river, including that tract of land within the above boundary formerly used by the Winifrede Mining
32 and Manufacturing Co. for railroad and other purposes.

You are hereby forbidden to trespass or enter upon said parcel of land for any purpose whatsoever without express authority from us, and are further notified that all trespasses will be vigorously prosecuted.

Respectfully,

R. W. CABELL, *Trustee.*
JAS. D. McCONIHAY,
Trustees for the Children & Grandchildren of John McConihay, Dec'd.

"Exhibit No. 4," referred to in the foregoing bill, is in the words and figures following, to wit:

This deed, made this 27th day of October, 1875, between John McConihay, of the first part, and James D. McConihay, trustee, of the second part, both of Kanawha county, West Virginia, witnesseth: That in consideration of the natural love and affection of the said John McConihay for his children and their descendants, as hereinafter named, the party of the first part doth grant with general warranty the following-described real and personal estate unto the said party of the second part, as trustee, upon the con-
33 ditions and stipulations as hereinafter set out, to wit: All those tracts of land conveyed to said John McConihay by Henry Harmon and wife, by deed dated 3d November, 1843, and recorded in Kanawha county court clerk's office, in deed-book N, page 536, to which deed reference is made.

And a certain other tract of land, containing about 230 acres, on Field's creek, conveyed to said John McConihay by the Winifrede Mining and Manufacturing Company by deed dated April 15th, 1856, and recorded in Kanawha county court clerk's office in deed-

book Y, page 426, to which deed reference is made, and to which said tract there is also upon record in said clerk's office in deed-book S, page 432, a quit-claim deed to said McConihay from B. & Y. Westfall, dated December 6th, 1852.

Also all those parcels of land conveyed to said John McConihay by Middleton Harmon & wife by deed dated March 28th, 1839, and recorded in the Kanawha county court clerk's office on the 23d May, 1839, to which deed reference is made.

Also the parcels of land conveyed to said John McConihay by Hiram Harmon and wife by deed dated 30th December, 1834, and recorded in aforesaid clerk's office in deed-book I, page 98, to which deed reference is made.

34 Also the tracts of land conveyed to said John McConihay by Charles Hedrick, administrator *de bonis non* with the will annexed of Luke Wilcox, deceased, by deed dated October 3, 1865, and recorded in said clerk's office in deed-book Y, page 493, to which deed reference is made.

Also the tract of land granted to said John McConihay by Samuel Shrewsbury and wife by deed recorded in said clerk's office in deed-book W, page 56, to which deed reference is made.

And also all other real estate whatsoever of which the said John McConihay is possessed.

The above-described real estate is conveyed subject to all the liens now existing upon the same.

The party of the first part doth also grant to the said trustee all the personal property of whatever character belonging to said party of the first part, including money, bonds, notes, accounts, choses in action, goods, and chattels, and all other personalty, of which the following is a partial list, viz:

Note of Wm. A. Owens, dated 1st March, 1869, for	$112 60
" " J. B. Hardwick, dated 25th July, 1872, for	54 00
" " " " " " " " "	200 00
" " J. B. Lewis & Co, dated 29th March, 1875, for	272 00
" " Lewiston Coal Co., dated 1st July, 1875, "	50 00
" " J. B. Lewis & Co., dated 1st Sept., 1875, "	2,097 52
" " Kanawha & Ohio Coal Co., now in the hands of Mollohan & Nash, attorneys	3,600 00
35 Note of Nathaniel English, dated 13th March, '72, for	40 00
Note of Charles Chafin and S. S. Chapman, dated 1st March, 1872, for	35 00
Note of Keeney, Prior, and Hudson, dated 1st January, 1874, for	50 00
Money now on deposit in the Kanawha Valley Bank in Charleston, W. Va., about	162 00
Also royalty due on coal mined by Lewiston Coal Company out of their mine, above Field's creek, since 1st September, 1875, about	285 00
Royalty due from same company on their lower bank since 20th May, 1875, about	1,600 00
Also back royalty from same, about	250 00

And all other notes and monies, accounts, &c., due to said John McConihay and not above enumerated; also amounts as follows due upon leases from the following-named persons on the 1st of March, 1876, viz:

From Calvary Paulley		$35 00
From Philip Adkins		18 00
From Wm. J. Kirk		
From L. D. Massey		15 00
From Bayless Cooper		10 00
From R. W. Cabell		72 00
From R. W. Cabell		100 00
From James Meadors		40 00
From Daniel McConihay		150 00
From Mrs. Brannon		60 00
From Eli Green		36 00
36 From Jonathan Clark		40 00
From J. T. Daddow		96 00
From A. Doss		154 25

Also the rent due at said date from Lewiston Coal Company, as alience of L. F. Donnally, trustee, &c., on the 216-acre tract above Field's creek for mining coal therefrom, $1,500.00, and in addition thereto the royalty of ½ per cent. per bushel upon all coal mined and shipped from said tract in excess of the rental value of above sum of $1,500.00 per annum; also the rent arising from the lease to L. F. Donnally, trustee, &c., of 5 acres of bottom land adjacent to above tract of 216 acres per annum, $30.00; also rent arising from 17 dwelling-houses leased to L. F. Donnally, trustee, &c., amounting in aggregate per annum to about $152.00; also the rent due as aforesaid from Lewiston Coal Company, as alienees of Morris, Phillips & Co., of the tract of about 472 acres of coal land below Field's creek, amounting per annum to $1,500.00; also the royalty at ½ cent. per bushel on all coal mined on said 472-acre tract above the annual rental of $1,500.00; also the rent arising from the parcel of bottom land leased to said Morris, Phillips & Co. and by them transferred to J. B. Lewis & Co. and by them transferred to
37 Lewiston Coal Company, amounting per annum to $——; also all the rents, issues, and profits arising from any or all of the real estate of said John McConihay. This conveyance is in trust for the purposes as hereinafter set out; that the said James D. McConihay, as trustee, shall take charge and control of all the estate, real and personal, before described, and manage and administer the same to and for the following ends and in the manner following: The object of this deed is to make a distribution of the nett income of the estate, real and personal, or of the estate itself as the case may be, on the conditions hereinafter set out amongst the following-named children and descendants of the children of the grantor (but subject to the provisions in favor of the grantor himself during life as hereinafter set out) representing eleven shares, to be made of equal value, as provided for hereinafter.

1st share: James McConihay, John McConihay, Samuel McConi-

hay, and Mary Susan Smith (formerly McConihay), children and heirs-at-law of Samuel McConihay, deceased, son of the grantor, representing one share.

2nd share: John McConihay, Mary Ellen McConihay, Mattie McConihay, and Minnie McConihay, children and heirs-at-
38 law of Ira H. McConihay, dec'd, son of the grantor, representing one share.

3d share: William R. McConihay, son of the grantor, representing one share.

4th share: Mary J. Shrewsbury, the daughter of the grantor and the wife of Dickinson Shrewsbury, representing one share to be held by her to her sole and separate use.

5th share: James D. McConihay, son of the grantor and the trustee herein named, representing one share.

6th share: Sallie L. Goshorn, daughter of the grantor and widow of David Goshorn, deceased, representing one share.

7th share: Felix G. McConihay, son of the grantor, representing one share.

8th share: Daniel S. McConihay, son of the grantor, representing one share.

9th share: Fannie E. Duffie, daughter of the grantor and widow of Patrick Duffie, deceased, representing one share.

10th share: Annie E. Cabell, daughter of the grantor & wife of Robert W. Cabell, representing one share, to be held by her to her sole and separate use.

11th share: Ella C. Anderson, daughter of the grantor and wife of John Anderson, representing one share, to be held by her to her sole and separate use.

39 The powers and duties of the said trustee and the management and disposition of the estate hereby conveyed shall be as follows:

1st. The said trustee shall reduce all the personalty into money as soon as practicable.

2d. He shall collect all rents now due and all the rents hereafter accruing so soon as due, so far as practicable.

3d. He shall lease or rent out so much of the real estate as is not now leased or rented out on the best possible terms, such leasing or renting to be subject to the approval of the majority of the beneficiaries under this deed, voting by shares and not *per capita*; and shall from time to time, as the leases expire, lease the real estate again as before provided for, unless a division of the same be made as hereinafter provided for.

4th. He shall close up and collect, so far as possible, all accounts and debts due, by note or otherwise, to the grantor.

5th. Whereas heretofore the grantor has made advances to several of the children, or to the husbands of some of his children for their benefit, the amount of which advances are represented by the notes of said children and of the husbands of some of his children as follows:

Mary J. Shrewsbury:

	Note dated June 20th, 1873, for	$20 00
40	Note dated June 4th, 1875, for	$500 00
	" " October 8th, 1875, for	50 00
	Note dated December 31st, 1875, for	200 00
	Total advances to Mary J. Shrewsbury	$770 00

William R. McConihay:

Note dated September 18, 1873, for		$85 00
" " March 1st, 1875,	"	21 00
" " M'ch 23d, 1875,	"	100 00
Total advances to W. R. McConihay,		$206 00

James D. McConihay:

Note dated January 1st, 1872, for being total advanced to him.	$291 40

Felix G. McConihay:

Note dated July 25th, 1874, for	$558 19
" " " " " "	87 00
Total advanced to F. G. McConihay	$645 19

Fannie E. Duffie:

Note dated January 1st, 1875, for	$1,337 88
" " June 12th, 1875 "	229 24
Total advanced to Fannie E. Duffie	$1,567 12

Daniel S. McConihay:

Note dated January 17th, 1873, for		$100 00
" " March 23d, 1875,	"	200 00
	Note dated March 24, 1875, for	50 25
41	Note dated April 29, 1875, for	$200 00
	" " July 3rd, 1873, "	32 00
	" " April 5th, 1875, "	40 00
	Total advanced to D. S. McConihay	$622 25

John Anderson for his wife, Ella C. Anderson:

Note dated June 2d, 1875, for	$500 00
" " October 1st, 1875, "	500 00
Total advanced to Ella C. Anderson	$1,000 00

Robert W. Cabell for his wife, Annie W. Cabell:

Note dated September 18th, 1872	$300 00
" " March 3d, 1875	150 00
Total advanced to Annie W. Cabell	450 00

Now the said trustee shall charge to said children the amounts above specified, with interest thereon at the rate of ten per centum per annum from the time they were made until the time when such payments shall be made to the other children (who have received no advances) by the trustee, as hereinafter prescribed, as shall equalize their receipts from the trustee with the advances aforesaid, with interest as aforesaid.

6th. The said trustee shall, out of the money coming into his hands, pay, first, all taxes due or accruing upon the estate
42 hereby conveyed; second, all the just debts and liabilities of the grantor heretofore incurred, and, third, shall pay unto the grantor the sum of $300.00 annually in monthly payments of $25.00, due and payable on the 27th day of each and every month for and during the remainder of the life of the grantor.

7th. The said trustee shall, out of the nett proceeds and income of the trust estate, after paying the amounts provided for above in the 6th section, receive as his full compensation for executing this trust a salary at the rate of $500.00 (five hundred dollars) per year, payable semi-annually, and also shall have the use and occupation, free of rent, of a house and garden in village of Lewiston during the existence of this trust whilst under his management.

8th. The said trustees shall, out of the monies in his hands, after the payments provided for in the 6th and 7th sections above, make semi-annual dividends at the end of each and every six months from the date of this deed, during the continuance of this trust, amongst the beneficiaries under this deed by shares, first paying to those who have received no advance sufficient to equalize them with those who have received advances, as before set out, before paying anything to those who have received such advances, and then *pro rata*
43 on the basis of receipts and advances until all eleven shares shall stand equal in respect of amounts received by them; and after all the shares have been equalized in the manner aforesaid thenceforth the dividends shall be made of one-eleventh part of the amount, to be divided to each and every share.

9th. The said trustee shall, at the end of every year of this trust, make a settlement of his accounts before a commissioner of one of the courts of Kanawha county.

10th. The said trustee shall keep detailed and accurate book accounts of all his receipts and disbursements with each subject and party in interest in this trust, and such accounts and books shall at all times be open to the inspection and examination of the parties interested herein.

11th. At or after the death of the grantor the estate shall either be divided amongst the eleven shares aforesaid or shall be continued to be managed, as herein provided, according to the wishes of the parties interested, as expressed by a majority thereof, voting by shares, but in case of a division of the property the same basis of equalization of the shares shall be used, in case they have not previously been equalized, according to the provisions of the 8th section above, as provided by said 8th section.

12th. Whereas the grantor holds a note for $700.00 against one of his sons, John H. McConihay, to whom no share in his estate is given hereby, the said grantor directs that said note shall be cancelled and surrendered to said John H. McConihay and he be forever released, as he is hereby released from the payment of the same, or any part thereof, but if hereafter any child or children begotten by said John H. McConihay in lawful wedlock be born unto him the parties representing the eleven shares, as hereinbefore set out, may, by a vote of a majority of such shares, give to such child or children an interest in the proceeds, issues, and profits of the trust estate equal to one-twelfth part thereof, scaling down the eleven shares equally to constitute such new share, or, in case of the division of the estate in kind, may, by similar vote of a majority of the eleven aforesaid shares, give to such child or children a twelfth part of the estate, and in case of such gift of a twelfth part of either the divided profits of the estate or of the estate itself a deed shall be executed to such child or children by the trustee, and by the parties representing the majority of the eleven aforesaid shares, and acknowledged and delivered by them, conveying such one-twelfth interest to said child or children, and such deed shall have the effect to convey and grant the proper proportionate parts of the eleven shares necessary to constitute the twelfth interest or share, as well of the minority of the shares as the majority thereof, executing said deed. But it is understood and hereby prescribed that, in case of the constituting and giving such one-twelfth interest or share that such share in the estate or its profits shall be as of the date that it is so constituted and conveyed, and shall have no retrospective reference to any dividends that have been made previous to the granting of such one-twelfth interest.

13th. It is further prescribed and directed by the grantor that by a vote of a majority of the shares herein the said trustee may be removed from his position as such and another trustee may be appointed in his room and stead in the manner provided by law, such new trustee to have the same powers and privileges and be bound by the same obligations and duties as hereinbefore prescribed for the trustee herein named.

Witness the following signature and seal.

JOHN McCONIHAY. [SEAL.]

WEST VIRGINIA, *Kanawha County, To wit:*

I, J. D. Baines, a notary public for said county, do certify that John McConihay, whose name is signed to the foregoing writing bearing date on the 27th day of October, 1875, has this day acknowledged the same before me in my said county.

Given under my hand this 1st day of November, 1875.

J. D. BAINES,
Notary Public.

KANAWHA COUNTY COURT CLERK'S OFFICE,
November 4th, 1875.

This deed was this day presented to me in my office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste: JOEL S. QUARRIER,
Clerk Kanawha County Court.

A copy from the records in my office.

Teste: HAMILTON MORRIS,
Clerk Kanawha County Court.

The injunction bond, the writ of subpœna issued in this cause, and return of service thereof, and orders at rules omitted from this transcript.

47 And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston November 8th, 1881—

THEODORE WRIGHT
vs.
JOHN MCCONIHAY & Others. } In Chancery.

On motion of the plaintiffs, by his attorney, it is ordered that the following papers, namely: A copy of a judgment of J. McConihay *v.* Winifrede Mining and Manufacturing Co. in the county court of Kanawha county, of November 4, 1853, marked Wright *vs.* McConihay, Proof A.

For Proof A, referred to in foregoing order, see page 71 of this record.

A copy of part of a decree, entered January 26, 1861, in the chancery cause of Bank of Virginia *vs.* Winifred Mining and Manufacturing Co., by the circuit court of Kanawha county, marked Wright *vs.* McConihay, Proof B.

A copy of a decree in same cause, by same court, entered June 24, 1870, marked Wright *vs.* McConihay, Proof C.

A copy of an agreement of counsel, filed in the same cause, and acknowledged for record relative to the entering of said last decree, marked Wright *vs.* McConihay, Proof D.

A copy of an order of same court, entered in same cause June 9, 1873, dismissing said chancery cause, marked Wright *vs.* McConihay, Proof E.

A copy of the record in the proceedings for condemnation of the the lands of J. McConihay in the courts of Kanawha county, marked Wright *vs.* McConihay, Proof F—be filed in this cause to be read as evidence upon the hearing thereof.

48 Proof B, filed under the foregoing order, is in the words & figures following, to wit:

THE BANK OF VIRGINIA & Others
vs.
THE WINIFREDE MINING & MANUFACTURING Co. & Others.

These causes came on this day to be heard by consent of all parties thereto upon the papers heretofore read therein, the depositions of witnesses filed therein, the various books of the Winifred Company filed therein, sundry bonds of the Winifred Company filed therein, and affidavits filed therein, sundry reports of Commissioner A. T. Laidley filed therein, together with papers therein referred to and exceptions endorsed on said reports, and were argued by counsel.

Upon consideration whereof the court is of opinion that the trust deed executed by the Winifrede Mining and Manufacturing Company to James J. Ring, deceased, bearing date July 1st, 1855, a copy of which is filed among the papers of this cause, is invalid and void as to all debts contracted by the said Winifred company, which the creditors do not claim directly under the trust by bonds or certificates issued under the trust, looking to the trust for their security, and are strangers thereto.

49

But the court is further of opinion that the said deed of trust is valid and binding upon all the parties privy thereto or who were stockholders of the said Winifred company at the time of its execution, and claim as creditors of the company under said deed of trust; and the court is further of opinion that all persons holding bonds, certificates of loans, or other evidences of indebtedness under the trust, or which were intended to be secured by the trust, are entitled to share and participate in the proceeds of the property of the company mentioned in the trust and conveyed thereby in the relative proportions that all such debts secured by the trust have one to the other; and the court is of opinion that out of the first proceeds arising from the sale of the property belonging to the Winifred Mining and Manufacturing Company the several debts and classes of debts next following are to be paid as follows:

First. The judgments of John McConihay for $3,503.96, with legal interest on $2,750.00, part thereof from the 1st July, 1860, until paid, and the judgments of Dickinson and Shrewsbury and McConihay for $1,722.55, with legal interest on $1,237.50, part thereof from the 1st July, 1860, until paid, all of which have been assigned to J. C. Harriott in trust for the use of Gouverneur S. Bibby and others, as shewn by the papers of the cause.

50

* * * * * * *

And the court doth further decree that the said Winifred Mining and Manufacturing Company shall have time until the 20th February, 1861, in which to pay all of the several claims and debts adjudged against them as aforesaid, and unless the said Winifred Mining and Manufacturing Company shall pay the same by the said 20th of February, 1861, then that Thomas B. Swann, who is hereby appointed a special commissioner for that purpose, shall, after having given seventy days' notice of the time, place, and terms of sale in the following manner, to wit: By publication in the "Kanawha Valley Star" and the "Richmond Examiner," papers published in Vir-

ginia, and in the "New York Journal of Commerce," a paper published in New York, and by furnishing to the counsel of all the parties to this suit a separate copy of notice of sale for every stockholder, do proceed at the front door of the court-house of
51 Kanawha county to sell at public auction and to the highest bidder or bidders that 10,000-acre tract of land belonging to the Winifrede Mining and Manufacturing Company, fully set out and described in the bill and exhibits and other proceedings in this cause, and lying on Kanawha and Coal rivers and on Field's creek and in the counties of Kanawha and Boone, together with all improvements thereon used in the mining, transporting, and shipping of coal, including railroad iron, picks, shovels, cars, engines, and whatever other tools and implements there may be upon the property belonging to said company upon the following terms to wit: $7,500.00 in cash and one-fifth part of the residue in six months, and the residue in 1, 2, & 3 and 4 years' equal instalments, and for all the deferred payments the commissioner is required to take from the purchaser or purchasers bonds with good personal security, bearing interest from date, and to retain the title of the land as a further security.

But the said commissioner, T. B. Swann, is not to act in the premises until he shall have given bond before the clerk of this court, as required by law, with sufficient security in the sum of $10,000.

* * * * * * *

52 Proof C, filed under the foregoing order, is in the words and figures following, to wit:

At a circuit court of Kanawha county continued and held at the court-house on the 24th day of June, 1870—

BANK OF VIRGINIA, Complainant,
vs.
THE WINIFREDE MINING & MANUFACTURING COMPANY & Others, Defts. } In Chancery.

This cause came on to-day to be heard again upon the papers heretofore read therein and the report of Commissioner Swann, now filed herein, with exhibits, and was argued by counsel. The report shews that Commissioner Swann has collected of the purchaser, Henry A. Cram, all the purchase-money from the Winifrede sale of lands, made under the decree of 31st of January, 1861, and had disbursed all of the same according to that decree, except the sum of five hundred and five dollars and 86c., which now remains in his hands subject to the order of court. The court doth confirm
53 the report of Commissioner Swann; and the court doth order Thomas B. Swann, hereby appointed a special commissioner for the purpose, to make to the purchaser, Henry A. Cram, a deed for the lands purchased by him as aforesaid, and stamp, acknowledge, and record the same at the costs of this suit, for which the court doth allow Commissioner Swann $50.00, to be taxed in this cause. And the court doth allow N. Fitzhugh and T. B. Swann,

counsel representing all the parties in this cause, $500.00, to be paid out of any money remaining in the hands of Commissioner Swann. And this cause is continued to settle a question of taxes paid by Commissioner Swann, as shown by a memorandum filed in this cause and signed by Thomas B. Swann.

A copy.
Teste: THOMAS SWINBURN, *Clerk.*

54 Proof "D," filed under the foregoing order, is in the words and figures following, to wit:

Ka. Cir. Ct, W. V. In Chancery.

THE BANK OF VIRGINIA, Complainant,
vs.
THE WINIFREDE MINING AND MANUFACTURING COMPANY & Others, Defendants.

On cross-bill.

JOHN P. CROSBY, Trustee, Complainant, *vs.* SAME, Def'ts.

KANAWHA C. H., W. VA., *19th April*, 1866.

We, the undersigned, representing all the parties in interest in the above causes, consent that a decree may be entered confirming the sale made by Commissioner Thomas B. Swann of the personal and real estate of the Winifrede Mining and Manufacturing Company on the 26th October, 1865, in pursuance of a decree of the Kanawha circuit court of date 26th January, 1861, at which sale Henry A. Crain was the purchaser for the sum of eighty thousand dollars ($80,000).

THOS. L. BROWN,

Agent & formerly attorney for John P. Crosby, trustee, & for all others claiming under trust-deed, and also for M. P. Brooks, adm'r, and Martha Fitzhugh.

55 THOMAS B. SWANN,

Agent for the Winifrede Mining & Manufacturing Company & for the judgment creditors claiming under the trust-deed, and also agent for the assignees upon the record of the Bank of Virginia, Jno. McConihay, Dickinson Shrewsbury, & McConahay & Dickinson & Shrewsbury, & also agent for Richard Oakley & J. C. Harriott, trustees, & E. H. Miller & W. H. Biby & J. H. Snyder & W. R. McConahay.

GEORGE JEFFRIES,

For himself, and assignee of J. C. McFarland, J. & J. Cadot, and agent for T. Grant.

N. FITZHUGH,

Agent & former attorney for Springer & Wightman, Babbitt, Good & Co., Capehart & Smith, W. H. Langley, Bain & West, Williamson & Hatfield, Gaston, Hinkle & Wallingford, N. W. Thompson, J. W. Ellis & Co., Robins & Pomeroy, Cruzeck, Mene-

ger & Co., C. Abbott & H. H. Neal, C. W. Maupin, C. & A. Henkig, Thomas Burrows, & G. D. Davis & Theo. Kirk.

W. A. QUARRIER,
Agent for late firm of Dickinson & Shrewsbury & for Ruffin, Donnally & Co., & for John McConahay.

BENJ. H. SMITH,
Atto. for the James River & Kanawha Company.

KANAWHA COUNTY,
RECORDER'S OFFICE, *April 23d*, 1866.

56 The foregoing paper writing, bearing date on the 19 day of April, 1866 (present month), was this day presented in this office and duly acknowledged by George Jeffries, Thomas B. Swann, Thos. L. Brown, William A. Quarrier, Nicholas Fitzhugh, and Benjamin H. Smith, whose names are respectively signed thereto as their several and respective acts and deeds for the purposes therein stated.

Teste: JNO. SLACK,
Recorder Kanawha County.

I see no objection to a decree of confirmation being entered upon the principle of this consent confirming and ratifying the sale made by Com'r Swann April 23, 1866.

D. POLSLEY.

As the representatives and agents of all the parties in this suit, as is shown by the above paper, we agree and consent that a decree may be rendered in the causes set out above confirming the sale of the Winifrede property made by Com'r T. B. Swann on 26 October, 1865, and distributing the funds arising therefrom upon the principles of the decree of 26th January, 1861; and we further consent that any such decree may be made by the judge, at his
57 chambers, in vacation, to be entered in vacation under his order.

April 23, 1886.

GEORGE JEFFRIES.
T. B. SWANN.
THOS. L. BROWN.
W. A. QUARRIER.
N. FITZHUGH.
BENJA. H. SMITH.

We authorize Com'r T. B. Swann to receive and disburse the several am'ts coming to the parties whom we respectively represent in this cause before the court.

May 1st, 1866.

N. FITZHUGH.
THOS. L. BROWN.
T. B. SWANN.
GEORGE JEFFRIES.

Proof E, filed under the foregoing order, in in the words and figures following, to wit:

BANK OF VIRGINIA & Others
vs.
WINIFREDE MINING AND MANUFACTURING COMPANY.

No order or proceeding appearing to have been entered or had in any of the foregoing several causes for more than four years past, except to continue the same, it is ordered that they be severally stricken from the docket, as provided by law.

Copy.
Teste: THOMAS SWINBURN, *Clk.*

58 An abstract of proof F, referred to in the foregoing order as filed, &c., is in the words and figures following, to wit:

Proceedings for the Condemnation of Lands of the Plaintiffs for the Use of Said Defendants.

Pleas before the justices of the county court of Kanawha county, at the court-house thereof, on the 24th day of November, 1853, and before the supreme court of appeals of Virginia the 25th day of August, 1857.

DICKINSON & SHREWSBURY
vs.
THE WINIFRED- MINING & MANUFATURING COMPANY. } Record.

And

JOHN MCCONIHAY
vs.
SAME, Defendants. } Record.

STATE OF WEST VIRGINIA, *ss:*

Be it remembered that heretofore, to wit, at a county court held for Kanawha county, at the court-house thereof, on the 18th day of April, A. D. 1853—

JOHN MCCONIHAY
vs.
THE PRESIDENT, DIRECTORS, AND COMPANY OF THE WINIFREDE MINING AND MANUFACTURING COMPANY.

On application to appoint five disinterested freeholders to assess damages to the plaintiffs for the condemnation of his lands, &c.

This day came the parties, by their attorneys, and notice of said application being proved, it was ordered by the court that Abel P. Sinnett, Joel Ruffun, George H. Waith, William Tompkins,
59 and Samuel Hannah, of Paint creek, freeholders of the county of Kanawha, and qualified as required by law (any three of whom may act), be, and they are hereby, appointed; and after being

duly sworn to assess the damages the plaintiffs, the owner of the land in the notice mentioned, may sustain by the defendants taking possession of and constructing a railroad on said lands from the mines of said defendants on Field's creek to the Kanawha river, so far as the same may pass over the lands of the plaintiff, and also for appropriating the contiguous lands the defendants may desire for warehouse, depots, &c., as in said notice is set out. And it is further ordered that the said freeholders do meet at the terminus of said road on the Kanawha river on the 13th day of May, 1853, and that they do make and return forthwith a report of their proceedings in the premises of this court according to law.

And at the same day, to wit, at a county court held as aforesaid on the 18th day of April, A. D. 1853—

WILLIAM DICKINSON, JOEL SHREWSBURY, and JOHN McCONIHAY

vs

THE PRESIDENT, DIRECTORS, & CO. OF THE WINIFRED MINING AND MANUFACTURING COMPANY.

On application to appoint five disinterested freeholders to assess damages to the plaintiffs for the condemnation of their lands for the use of said company, &c.

60 This day came the parties, by their attorneys, and notice of this application being proved, it is ordered that Abel P. Sinnett, Joel Ruffun, George H. Waith, William Tompkins, and Samuel Hannah, of Paint creek, freeholders of the county of Kanawha, qualified as by law required, any three of whom may act, be, and they are hereby, appointed, after being duly sworn, to assess the damages the plaintiffs, the owners of the land in the notice mentioned, may sustain by the defendants taking possession and constructing a railroad on said lands from the mines of defendants on Field's creek to the Kanawha river, so far as it may pass over their lands, and also for appropriating the contiguous lands the defendants desire as sites for warehouses, depots, &c., as in said notice is set out; and it is further ordered that said freeholders do meet on lands at the mines aforesaid on the 12th day of May, 1853, and that they do make out and return forthwith a report of their proceedings in the premises to this court according to law.

And at another day, to wit, at a county court held as aforesaid on the 16th day of May, A. D. 1853—

JOHN McCONIHAY

vs.

THE WINIFREDE MINING AND MANUFACTURING COMPANY,

and

WILLIAM DICKINSON, JOEL SHREWSBURY, and JOHN McCONIHAY

vs.

SAME, Defendants.

On separate applications before the court to appoint freeholders

to assess damages to the plaintiffs, &c., made at April term
61 last, it appearing that the orders then made in said causes appointing freeholders to assess damages, and for other purposes in said orders mentioned, have not been executed, by consent the execution of the same by the same freeholders then appointed is deferred until Wednesday, the 22d day of June next, and the parties agree that if the said orders are not executed on that day that either party may adjourn over the execution of the same from day to day and time to time until the duties required of said freeholders and specified in said orders are fully completed and ended.

And at another day, to wit, at a county court held as aforesaid on the 21st day of June, 1853—

JOHN MCCONIHAY
vs.
THE WINIFREDE MINING & MANUFACTURING COMPANY
and
WILLIAM DICKINSON, JOEL SHREWSBURY, & JOHN MCCONIHAY
vs.
SAME, Defendants.

On separate application before the court to appoint freeholders to assess damages to the plaintiffs, &c., made at April term last, it appearing that the orders then made in said causes appointing freeholders to assess damages, and for other purposes in said orders mentioned, have not been executed, by consent the execution of the same, by the same freeholders then appointed, is deferred until the 15th day of July next, and the parties agree that if the said orders are not executed on that day that either party may ad-
62 journ over the execution of the same from day to day and time to time until the duties required of said freeholders, and specified in said orders, are fully completed and ended.

And at another day, to wit, at a county court held as aforesaid on the 17th day of August, 1853—

JOHN MCCONIHAY
vs.
THE PRESIDENT, DIRECTORS, & CO. OF THE WINIFREDE MINING AND MANUFACTURING COMPANY.

On application to appoint commissioners to assess damages, &c.

This day came the parties, by their attorneys, and the report of the said commissioners having been made and returned, and divers witnesses having been sworn and in part their evidence heard, *and* further examination is deferred until to-morrow, until which time the cause is continued.

And at the same day, to wit, at a county court held as aforesaid on the 17th day of August, 1853—

DICKINSON & SHREWSBURY & JOHN McCONIHAY
vs.
THE PRESIDENT, DIRECTORS, & Co. OF THE WINIFREDE MINING & MANUFACTURING COMPANY.

On application to appoint commissioners to assess damages, &c.

This day came the parties, by their attorneys, and the report of the said commissioners having been made & returned, and divers witnesses having been sworn and *and* in part examined, the further evidence to be adduced in the cause is deferred until to-mor-
63 row, until which time this cause is continued.

And at another day, to wit, at a county court held as aforesaid on the 18th day of August, 1853—

JOHN McCONIHAY *vs.* WINIFRED- COMPANY.

On application to assess damages, &c.

This day came the parties, by their attorneys, and the evidence being fully heard and the arguments of counsel also in part heard the cause is again continued until to-morrow for the further hearing of counsel on said application.

And at the same day, to wit, at a county court held as aforesaid on the 18th day of August, 1853—

JOHN McCONIHAY & DICKINSON & SHREWSBURY
vs.
WINIFRED- COMPANY.

On application to assess damages, &c.

This day came again the parties, by their attorneys, and the evidence being heard in full & the arguments of counsel in part the further hearing of said arguments is deferred until to-morrow, until which time the cause is continued.

And at another day, to wit, at a county court held as aforesaid on the 19th day of August, 1853—

JOHN McCONIHAY
vs.
THE WINIFRED- MINING & MANUFACTURING COMPANY.

On application to assess damages, &c.

64 This day came again the parties, by their *by their* attorneys, and thereupon the arguments of counsel being fully heard, and the court *is* of opinion that no good cause is shown against the report of the freeholders made and returned in this cause, it is ordered that the same be confirmed, and is here recorded in these words and figures:

"We, Joel Ruffin, Abel P. Sinnett, George H. Waith, and Samuel Hannah, freeholders appointed by an order of the county court

of Kanawha county for the purpose of ascertaining the damages which would be sustained by John McConihay, the proprietor of certain land in said county which the Winifrede Mining & Manufacturing Company propose to condemn for their use—the same proposed to be condemned is more particularly described in the specification and statement of John R. Garland, the vice-president and agent of said company, and the plat of Abel P. Sennett, each of which is herewith returned as part of this report, marked A & B — do hereby certify that we met together on the land aforesaid on the 15th day of July, 1853, the day appointed therefor by said order, & having been first duly sworn, & having reviewed the premises aforesaid and not being able to complete the duties assigned us on that day, by consent of parties, we adjourned to meet at the lower company store, in the Kanawha salines, on Wednesday, the 20th inst.; and having met pursuant to adjournment, and the
65 parties and the counsel being present, we proceed- to estimate the quantity and quality of the land aforesaid, the quantity of additional fencing which would probably be occasioned by its condemnation, and all other inconveniences which seemed to us likely to result therefrom to the proprietor of said land; that we combined with these considerations as far as we could a just regard to the advantages which would be derived by the proprietor of said land from the construction of the railroad for the use of which the said land is to be condemned; that under the influence of these considerations we have estimated and do hereby assess the damages aforesaid at the sum of two thousand seven hundred and fifty dollars.

"Given under our hands and seals this 20th day of July, 1853.

"JOEL RUFFUN [SEAL.]
"ABEL P. SINNETT. [SEAL.]
"G. H. WAITH. [SEAL.]
"SAMUEL HANNA." [SEAL.]

[WEST] VIRGINIA, } *To wit:*
Kanawha County, }

I, Samuel Shrewsbury, a justice of the peace for said county, do hereby certify that the above-named freeholders, before they executed their duties above certified, were solemnly sworn before me that they would impartially & justly, to the best of their
66 ability, ascertain the damages that would be sustained by the above-named John McConihay by the condemnation of the above-mentioned land for the use of the Winifrede Mining and Manufacturing Company, and that they would certify truly their proceedings thereupon to the court of the said county.

Given under my hand this 20th July, 1853.

SAMUEL SHREWSBURY.

The commissioner's fees for the within are as follows, viz:

To Joel Ruffun for 1 day, @ $5	$5 00
To Abel P. Sinnett for 2 days, @ $5	10 00
" Samuel Hannah, 1½ days, @ $5	7 50
" George H. Warth, 1 day, @ $5	5 00
	$27 50

Received payment *by* Dickinson, Shrewsbury, & McConihay.

A. P. SINNETT,
Commissioner.

Whereupon the defendants, the company aforesaid, moved the court to set aside the confirmation of said report & award them a new hearing on said application, which motion being considered is overruled.

And at the same day, to wit, at a county court held as aforesaid on the 19th day of August, 1853—

DICKINSON & SHREWSBURY & JOHN McCONIHAY

vs.

THE WINIFRED MINING & MANUFACTURING COMPANY.

On application to assess damages, &c.

This day came again the parties, by their counsel, and
67 thereupon the arguments of counsel being fully heard, and the court being of opinion that no good cause is shown against the report of the freeholders made and returned in this cause, it is ordered that the same be confirmed, and is here recorded in these words and figures:

We, Joel Ruffun, Abel P. Sinnett, George H. Warth, and Samuel Hannah, freeholders, appointed by an order of the county court of Kanawha county, for the purpose of ascertaining the damages which would be sustained by Joel Shrewsbury, William Dickinson, & John Mc Conihay, the proprietors of certain lands in said county, which the Winifred Mining and Manufacturing Company propose to condemn for their use, the same proposed to be condemned is more particularly described in the specification and statement made by John R. Garland, the vice-president and agent of said company, and the plat of Abel P. Sinnett, each of which is returned by us, with our report in the case of John McConihay against said company, marked as Exhibit A & B, and are also made part of this report, and to which particular reference is here made, do hereby certify that we met together on the lands aforesaid on the 15th of July,
1853, the day appointed therefor by said order, and having
68 been first duly sworn, and having reviewed the premises aforesaid, and not being able to complete the duties assigned us on that day, by consent of parties we adjourned to meet at the lower company store in the Kanawha salines on Wednesday, the 20th inst., and having met pursuant to adjournment, and the parties and their

counsel being present, we proceeded to ascertain the quantity and quality of the land aforesaid, the quantity of additional fencing which would probably be occasioned by its condemnation, and all other inconveniences which seemed to us likely to result therefrom to the proprietors of said lands; that we combined with these considerations, as far as we could, a just regard to the advantages which would be derived to the proprietors of said lands from the construction of the railroad for the use of which the said land is to be condemed; that under the influence of these considerations we have estimated, and do hereby assess, the damages aforesaid at the sum of twelve hundred dollars for the McBride or 300-acre tract and thirty-seven dollars and fifty cents for the one-fourth part of the tract above that.

Given under our hands and seals this 20th day of July, 1853.

JOEL RUFFUN. [SEAL.]
A. P. SINNETT. [SEAL.]
G. H. WARTH. [SEAL.]
SAMUEL HANNA. [SEAL.]

69 VIRGINIA, } *To wit:*
Kanawha County, }

I, Samuel Shrewsbury, a justice of the peace for the county of Kanawha aforesaid, do hereby certify that the above-named freeholders, before they executed their duties above certified, were solemnly sworn before me that they would impartially & justly, to the best of their ability, ascertain the damages that would be sustained by the above-named William Dickinson, Joel Shrewsbury, and John McConihay by the condemnation of the above-mentioned land for the use of the Winifrede Mining and Manufacturing Company, and that they would certify truly their proceedings thereupon to the court of the said county.

Given under my hand this 20th July, 1853.

SAMUEL SHREWSBURY.

The commissioner's fees for the above are as follows, viz:

To Samuel Hannah for 1½ day, *@* $5	$7 50
" George H. Warth for 1 day, *@* $5	5 00
" Joel Ruffun for 1 day, *@* $5	5 00
" Abel P. Sinnett for 2 days, *@* $5	10 00
	$27 50

Received payment of Dickinson & Shrewsbury & McConihay.

A. P. SINNETT, *Com'r.*

Whereupon the defendants, the company aforesaid, moved the court to set aside the confirmation of said report and award them a new hearing on said application, which motion being considered is overruled.

70 And at another day, to wit, at a county court held as aforesaid on the 26th day of August, 1853—

JOHN McCONIHAY
v.
THE WINIFREDE MINING & MANUFACTURING COMPANY.

On application to have damages assessed, &c.

DICKINSON & SHREWSBURY and JOHN McCONIHAY
vs.
SAME, Defendants.

On application for same purpose.

MEM.—On the trial of these causes the defendants tendered three bills of exceptions to opinions of the court delivered on said trial, marked exceptions No-. 1, 2, & 3, which are signed, sealed, and reserved to them, and the said causes having been heard and tried together by consent of parties, by their counsel, it is agreed that the said 3 bills of exceptions shall be deemed and taken as bills of exceptions to each of said causes and that the embodiment of both cases into one record shall suffice for presentation to an appellate court.

(Bills of exception Nos. 1, 2, & 3 referred to in the foregoing mem. omitted here.)

And at another day, to wit, at a county court held as aforesaid on the 24th day of November, 1853—

JOHN McCONIHAY
v.
THE WINIFRED- MINING AND MANUFACTURING COMPANY.

71 On application to assess damages, &c.

(Proof A.) This day came again the parties, by their attorneys, and the def'ts having failed to pay or tender to the plaintiffs the amount of the damages assessed to him by the commissioners in this cause it is considered by the court that the pl'ff recover against them $2,750.00, the damages assessed by the freeholders, as shewn in their report filed in this cause as aforesaid, and double costs by him expended about his application in this behalf, and execution is awarded him against the said defendants for said damages and double costs.

And at the same day, to wit, at a county court held as aforesaid on the 24th day of November, 1853—

DICKINSON & SHREWSBURY & JOHN McCONIHAY
vs.
THE WINIFRED- MINING & MANUFACTURING COMPANY.

On application to assess damages, &c.

This day came again the parties, by their attorneys, and the def'ts having failed to pay or tender to *to* the plaintiffs the amount of damages assessed to them by the commissioners in this cause it is considered by the court that the pl'ffs recover against them $1,237.50,

the damages aforesaid, and double the costs by the said ap-
72 plicants in this behalf expended. An execution is awarded them against the said def'ts for said damages and double costs.

* * * * * * *

Here follows other matter omitted by order of counsel.

And at another day, to wit, at a circuit court held for Kanawha county, at the court-house thereof, on the 3d day of November, 1853—

Came the Winifred Mining & Manufacturing Company, by their attorney, and presented a petition for a writ of supersedeas to certain orders and proceedings of the county court of the county had on the application of John McConihay & Dickinson & Shrewsbury & John McConihay to appoint freeholders to assess damages to them for the condemnation of their lands for the use of said company, together with the certificate of the attorneys of said company appended thereto. Whereupon a writ of supersedeas is awarded to said orders and proceedings; but said writ is not to be issued until the said company or some responsible person for them shall, in court or the clerk's office, enter into bond, with good security, in the penalty of $300.00, conditioned according to law.

And at another day, to wit, at a circuit court held as aforesaid on the 11th day of November, 1853—

73 Came the parties, by their attorneys, and thereupon, on motion of appellees, a rule is awarded them against the appellants, returnable here on Monday next, to shew cause, if any they can, why the order made on a former day of this term awarding the writ of supersedeas and requiring of the appellants bond, with security, in the penalty of $300, shall not be so amended as to require the penalty of said bond to be in a sum equal to double the amount of the money damages adjudged by the commissioners in the record from the court below mentioned to be paid by the appellants to the appellees for the use and occupation of their land.

And at another day, to wit, at a circuit court held as aforesaid on the 14th day of November, 1853—

Came the parties, by their attorneys, and thereupon the rule awarded the appellees against the appellants on Friday last being returned executed on John R. Garland, engineer and principal agent of said company, and also vice-president of the same, the said appellants, by their counsel, enter their appearance to the said rule, and the arguments of counsel thereupon being heard the court takes time until to-morrow to consider thereof.

And at another day, to wit, at a circuit court held as aforesaid on the 15th day of November, 1853—

74 Came again the parties, by their att'ys, and the court having maturely considered the rule awarded the appellees on Friday last, requiring the appellants to shew cause why the penalty of the supersedeas bond should not be enlarged, and the arguments of counsel thereupon, doth order that the said rule be made absolute, and that so much of a former order made in this cause as directs the appellants to give bond in the penalty of $300 be set

aside; and that the said appellants do enter into bond, payable to the appellee, John McConihay, in his separate case in the record in the court below mentioned, in the penalty of $3,000.00, conditioned according to law; and that they, the said appellants, also enter into bond, payable to the appellees, Dickinson & Shrewsbury & John McConihay, in their separate case in said record mentioned, in the penalty of $1,500.00, conditioned according to law.

And [at] another day, to wit, at a circuit court held as aforesaid on the 14th day of June, 1854—

THE WINIFREDE MINING AND MANUFACTURING COMPANY, Appellants,
vs.
WILLIAM DICKINSON, JOEL SHREWSBURY, [AND] JOHN McCONIHAY, Appellees.

On supersedeas to an order or judgment of the county court
75 of Kanawha county, rendered on the 19th day of August, 1853; and

THE SAME, Appellants, *vs.* JOHN McCONIHAY, Appellee.

On supersedeas to an order or judgment of the county court of Kanawha Co., rendered the 19th day of August, 1853.

This day came the parties, by their att'ys, and thereupon, by agreement and consent, both of said causes came on to be heard and decided together; and the transcript of the record being seen and inspected, it seems to the court here that there is error in the judgment and opinion of the county court in this, that on equal division of the said county court — did, in point of law, so operate as of itself to confirm the reports in the records & proceedings set out and mentioned.

Therefore, it is considered by the court that the said judgments and orders of the county court be reversed and annulled, and that the appellants recover against the appellees their costs by them about their appeal in this behalf expended, and that the said causes be remanded to the said county court to be further proceeded in. The court declines to decide or to express any opinion on the other questions arising in the record, it not being necessary to decide the same.

And now at this day, to wit, at a supreme court of appeals
76 held at Lewisburg on Tuesday, the 25th day of August, 1857—

JOHN McCONIHAY, Plaintiff,
against
WINIFREDE MINING AND MANUFACTURING COMPANY, Defendants.

Upon a writ of supersedeas to a judgment rendered by the circuit court of Kanawha county on the 14th day of June, 1854, revising a judgment of the county court of said county rendered on the 19th day of August, 1853, in favor of the plaintiff on error against the defendant on error.

The transcript of the record of said judgment and the arguments

of counsel having been maturely considered it seems to the court, for reasons stated in writing and filed with the record, that the judgment of the circuit court is erroneous. It is therefore considered by the court that the same be reversed and annulled, and that the plaintiffs in error recover against the defendants in error his costs expended in the prosecution of his writ aforesaid here; and this court proceeding to render such judgment as the circuit court should have rendered, it is further considered by the court that the judgment of the county court be affirmed, and that the said plaintiffs in error recover against the defendants in error his costs expend*ing* about his defence in said circuit court, which is ordered to be certified to the said circuit court.

77 A copy.

Teste: JOHN A. NORTH, *Clk.*

Cost of pl'ff in error ..... $41 83, exclusive of manuscript record, the cost of which is not certified.

2 09 cir. ct.

$43 92

And at the same day, to wit, at a supreme court of appeals held at Lewisburg on Thursday, the 25th day of August, 1857—

WILLIAM DICKINSON, JOEL SHREWSBURY, & JOHN McCONIHAY, Plaintiffs,

against

WINIFRED MINING & MANUFACTURING COMPANY, Def'ts.

Upon a writ of supersedeas to a judgment rendered by the circuit court of Kanawha county on the 14th day of June, 1854, reversing a judgment of the county court of said county rendered on the 19th day of August, 1853, in favor of the plaintiffs in error against the defendants in error.

The transcript of the record of said judgment and the arguments of counsel having been maturely considered, it seems to the court here, for reasons stated in writing and filed with the record, that the judgment of the circuit court reversing the judgment of the county court is erroneous.

Therefore it is considered by the court that the same be reversed and annulled, and that the plaintiffs in error recover against the defendants in error their costs expended in the prosecution of their writ aforesaid here; and this court proceeding render such

78 judgment as the circuit court should have rendered, it is further considered by the court that the judgment of the county court be affirmed, and that the parties who are plaintiffs in error here recover of the defendants in error here their costs expended about their defence in said circuit court, which is ordered to be certified to the said circuit court.

A copy.

Teste: JOHN A. NORTH, *Clk.*

Appellant's costs---- $47 49, exclusive of manuscript record.
2 09

$49 58

The following is a description of the quantity and location of the lands taken and occupied by the Winifred- Mining & Manufacturing Company belonging to John McConihay and Dickinson & Shrewsbury and John McConihay, and marked as Exhibit ("A") and filed with the papers of this cause.

"A description of the quantity and location of the land taken and occupied by the Winifred- Mining & Manufacturing Company belonging to John McConihay, to wit:" The land occupied by their present railroad and thirty feet on either side thereof from the point F, as laid down by the map of Abel P. Sinnett, dated the 16th July, 1853, for the use of the commissioners, &c., and running to the beginning of the deep cut in the meadow of said McConihay at the point D, as laid down on the map of the said Abel P. Sinnett, and the land occupied by their present railroad and *is* forty feet on either side thereof through the said deep cut from the said point D to the said point "C," as laid down upon said map, and the land occupied by their present site of their railroad from the point C to A,
79 as laid down on said map, taking the river bank from its brink to the river, and also extending from the brink of the river bank or center line of the railroad sixty feet into the said meadow along the whole length of the line from C to A.

A description of the quantity and location of the land taken and occupied by the Winifrede Mining & Manufacturing Company, claimed to be the land belonging to Dickinson & Shrewsbury and John McConihay, and in the McBride survey, to wit: Along the present site of their railroad and thirty feet on either side thereof from the center of said railroad from the point F to the point H, as laid down upon the aforesaid map of Abel P. Sinnett. The site of the said railroad also passes through two lots of land above the McBride survey, in which the said Dickinson & Shrewsbury and John McConihay claim an interest of one-fourth. The portion of said lots occupied by the said company is the site of their present railroad, through said lots and thirty feet on either side of the centre of said road, which said one-fourth of said last-mentioned lots are claimed by the said Dickinson & Shrewsbury & McConiha under a conveyance to them by the heirs of Henry Harmon.

JOHN R. GARLAND, *Eng'r.*

STATE OF WEST VIRGINIA, }
County of Kanawha, } *ss:*

80 I, Joel S. Quarrier, clerk of the county court of Kanawha county, in the State of West Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings of a certain condemnation lately pending in said court, wherein the Winifred- Mining and Manufacturing Company were pl'tffs, and John McConihay and Dickinson & Shrewsbury and John McConihay were def'ts.

In testimony whereof I have hereto set my hand this 15th day of December, A. D. 1876.

JOEL S. QUARRIER,
Clk Kanawha County Court.

A true copy from the records of my office, except omissions noted in the copy.

Teste: HAMILTON MORRIS,
Clerk Kanawha County Court.

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston November 16, 1881—

THEODORE WRIGHT
vs.
J. McCONIHAY & Others. } In Chancery.

J. H. McConihay, by counsel, this day moved the court to file his answer in this cause and the answer is filed accordingly.

81 Which said answer last aforesaid is in the words and figures following, to wit:

The Separate Answer of J. H. McConihay in the Above Cause.

This respondent, J. H. McConihay, saving, &c., answers & says that he knows the facts about the condemnation of the land for a way and depot at Field's creek in Kanawha county, & in & upon the land of his father, John McConihay, as charged in the bill; that he knows that his father was paid the full amount at which the land so taken was assessed by the com'rs appointed by the court for that purpose; that it was full—not to say large—value for the quantity of land; that his father never claimed the land at any time afterward, but that the Winifred Co. and Henry A. Cram have ever since claimed & held the land and had possession of it, as respondent verily believes; that he, respondent, has been improperly deprived of his proportionate interest in his father's estate, but expects to secure it; but he in nowise considers that the land condemned & paid for & used by the Winifred Co. for its railroad track & depot is any part of that estate, and he, respondent, disclaims all ownership or interest therein and all connection with the action of any of the other heirs who do so claim such interest.

And having thus answered he prays to be hence dismissed with his costs.

J. H. McCONIHAY,
By SMITH & KNIGHT, *Sol's.*

82 And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, November 23, 1881—

Defendants, by counsel, this day filed their demurrer in this cause, which is set down for argument, and being duly argued & considered by the court is overruled. And thereupon the defendants asked leave to file their joint answer in this cause, and the same is

filed accordingly, and the plaintiff replies generally thereto. And thereupon it is ordered that this cause be, and the same is hereby, submitted to the court for the full hearing thereof, with leave to the plaintiff to take such testimony as he may desire in support of his bill within 30 days from the rising of the court, and leave to the defendants to take such testimony as they may desire within 60 days from the rising of this court, and after the expiration of said 60 days 10 days to the plaintiff to take such testimony in rebutting defendants' testimony as he may desire, and at any time after 70 days from the rising of this court either party, upon 10 days' notice by service upon any one of the attorneys of the opposing party
83 of the time and place for so doing, may ask a decision of the cause by the court in chambers, and the attorneys may then be heard in argument or otherwise before such decision is made.

The demurrer aforesaid is in the words and figures following, to wit:

In the District Court of the United States for the District of West Virginia.

THEODORE WRIGHT
v. } In Chancery.
JAMES D. MCCONIHA, Trustee, & *als.*

The demurrer of James D. McConiha, in his own right and as trustee; Wm. R. McConiha, Felix G. McConiha, Mary J. Shrewsbury and Dickinson Shrewsbury, her husband; Sallie A. Goshorn, Ella C. Anderson and John Anderson, her husband; James McConiha, John McConiha, Samuel McConiha, and Mary Smith, children of Samuel McConiha, deceased, and C. B. Smith, husband of said Mary; John McConiha, Mattie McConiha, Mary Ellen McConiha, and Minnie McConihay, children of Ira McConiha, dec'd;
84 Daniel McConiha & Fannie E. Dabney and R. D. Dabney, her husband, to the bill of complaint of Theodore Wright, complainant.

These defendants respectfully, by protestation, not confessing or acknowledging all or any of the matters and things in said bill, contained to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demur- sheweth that the said complainant hath not, by his said bill, ma le such a case as entitles him in a court of equity to any relief from or against these defendants touching the matters contained in said bill or any of such matters.

I do certify that in my opinion the foregoing demurrer of James D. McConiha and others to the bill of complaint of Theodore Wright, complainant in this suit, is well founded in law and proper to be filed in the above cause.

J. F. BROWN,
Solicitor [and] of Counsel for said Defendants.

UNITED STATES OF AMERICA, }
District of West Virginia, } *ss:*

85 James D. McConaha, being duly sworn, does depose and say that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

JAMES D. McCONIHAY.

Taken, subscribed, and sworn to before me this 18th day of November, 1881.

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

The joint answer of the defendants filed under the foregoing order, together with the exhibits referred to in the answer, is in the words and figures following, to wit:

86 District Court of the United States for the District of West Virginia.

THEODORE WRIGHT }
v. } In Chancery.
JAMES D. McCONIHAY, Trustee, *et als.* }

The joint and separate answers of James D. McConiha, in his own right and as trustee; Wm. R. McConiha, Felix G. McConihay, Mary J. Shrewsbury and Dickinson Shrewsbury, her husband; Sallie A. Goshorn; Annie E. Cabell and R. W. Cabell, her husband; Ila C. Anderson and John Anderson, her husband; James McConiha, John McConiha, Samuel McConiha, and Mary Smith, children of Samuel McConiha, dec'd, and C. B. Smith, the husband of the said Mary; John McConiha, Mary E. McConiha, Mattie McConiha, and Minnie McConihay, children of Ira McConihay, dec'd; Daniel McConiha, and Fannie E. Dabney and R. D. Dabney, her husband, to the bill of complaint of Theodore Wright, filed in the above-entitled cause against them and others.

87 These respondents, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and imperfections in the said complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, answering, say:

That by deed dated the 27th day of October, 1875, [in pencil] (see page 32 of this record), a copy whereof is filed with the bill, John McConiha, Sr., since deceased, conveyed to the said James D. McConiha, in trust for the use and enjoyment of himself and his co-respondents, other than those designated as "husbands," a large and very valuable coal property lying in Kanawha county, on the south side of the Great Kanawha river, on Field's creek, a tributary of said river; that there are thirteen veins of coal upon said prope-

erty, four of which, averaging from 3½ to 5 feet in thickness, of the best qualities of coal, have been opened and works, which coal property is valued at and fairly worth upwards of $200,000.00, said property being especially valuable because being situate along the Chesapeake and Ohio railway and on the Kanawha river at deep water, and at a point from which coal may be shipped by river or rail cheaply and conveniently to market.

88 Respondents further say that the bottom land and river frontage belonging to said coal property is very limited and of great value to respondents and indispensable to the enjoyment of said property.

And respondents further say that the right of way and frontage mentioned in the bill and in controversy in this suit includes the greater and more valuable portion of said river frontage; that their said grantor was seized and possessed of said land and every part of it for a great many years, to wit, for forty years preceding said conveyance, and had good and perfect title thereto and to every part thereof.

And respondents believe and charge that by virtue of the deed aforesaid they have a good and indefeasible title likewise to every part of said property, and have held actual and continual possession of the same, excepting only a small portion of the parcel in controversy in this suit.

Respondents further say that a few months ago they were advised that one Theodore Wright claimed to have purchased a large coal property lying next behind that of respondents, and as part of it the right of way and river front mentioned in the bill and in fact belonging to respondents by virtue of their aforesaid deed, which property in controversy is shown by the plat herewith filed as Exhibit A, & that he was about to enter upon the same for the purpose of constructing a coal railroad; whereupon respondents,

89 through their trustee, caused to be served upon the said Wright the notice referred to in his bill as Exhibit No. 3, notifying him of their ownership of said land and forbidding all trespasses upon the same.

Respondents say that the parcel of land specified in said notice, the title to which is sought to be drawn in question and adjudicated in this cause, is embraced in their said deed, and is theirs and theirs only, and deny that the said Wright has any right or title to the same or any part thereof, and here further deny that he has any right to invoke the powers of a court of equity in the premises—a court of law furnishing a full and adequate remedy if he have any such title.

Respondents say that they have caused the claim of the said Wright to be carefully examined, and are advised and believe that the facts upon which said claim *is* based is as follows, to wit:

1st. That by act of the General Assembly of Virginia, passed February 16, 1850, a corporation was created by the name of the "Winifried Mining and Manufacturing Company" for the purpose of digging, mining, raising, and transporting coal and other minerals, &c., by the provisions of said charter, which is asked to be read

as part of this answer. Said company was invested with all the rights, powers, and privileges and subject to all the limitations and restrictions contained in an act entitled an "Act prescribing certain general regulations for the incorporation of railroad companies," passed March 11, 1837; that under its said charter said company, by deed dated the — day of —, 185– (a copy whereof is here filed as Exhibit 2), acquired a tract of land containing about 10,180 acres, lying next behind respondent's said coal property; that afterwards, to wit, on the 18th day of April, 1853, said company, under the powers vested in it by the reference in its charter to the said act of 1837, having taken possession of, as they alleged, for the purpose of a right of way, depot, and shipping point for their proposed railroad, the parcels of land now in controversy in this suit—then the land of the said John McConiha, Sr., the said Jno. McConihay applied to the county court of Kanawha for an assessment of damages therefor; that upon said application said court appointed a commission consisting of five freeholders, as required by said act, who returned their report to court November 24, 1853, in which they say, after speaking of the value of the land actually taken and additional fencing rendered necessary by the proposed condemnation: "We combined with these considerations as far as we could a just regard to the advantages which would be derived by the proprietors of said land from the construction of the railroad for the use of which said land is to be condemned; that under the influences of these considerations we have estimated, and do hereby assess, the damages aforesaid at the sum of $2,750.00." Which report was thereupon confirmed by said court, and afterwards, to wit, on the 24 day of November, 1853, said company having failed to pay the damages so assessed, judgment was rendered against it for the same, with costs of the proceedings.

Respondents further say that said company still refused to pay the sum so assessed, and every part of it, and an appeal was taken by it from said judgment to the circuit court of said county, and afterwards an appeal from its judgment to the court of appeals of the Commonwealth of Virginia, which court affirmed the county *county* court in its aforesaid judgment, to wit, on the — day of ——, 1857; that said company still refused to pay said judgment and the same remained unpaid and unsatisfied up to and at the date of the judicial sale next hereinafter mentioned, to wit, October 26th, 1865, as fully appears from the exhibits filed in this cause; that in 1860 a creditor's suit having been instituted by the Bank of Virginia against said company to wind up the same and ascertain its assets and subject them to the payment of its numerous debts, the circuit court of Kanawha county, by its decree in said cause—a copy of which is filed with the bill—ascertained the real estate of said company to be the aforesaid tract of land of 10,180 acres, purchased as aforesaid, and then decreed that the same be sold to pay said debts; that afterwards, to wit, on the 26 day of October, 1865, said tract of 10,180 acres was duly advertised and sold under said decree to one Henry A. Cram, and afterwards, to wit, on the 25th day

of June, 1870, the commissioner of said court, pursuant to and in conformity with the decrees in said cause, executed to him a deed for the same, copies of which deed and notice of sale & the bill in said cause are filed herewith as Exhibits 3 & 4 & 6, respectively, and made part of this answer; that afterwards, to wit, on the 22d day of November, 1878, the said Cram filed a bill in the circuit court of said county, which he afterwards removed to the district court of the United States for the district of West Virginia,
93 sitting at Charleston, asking a sale of said 10,180-acres tract of land purchased by him as aforesaid and division of the proceeds between himself and certain parties named as defendants in said suit holding equitable interests in said land under him; that afterwards, on the — day of March, 1879, conceiving the idea of swelling the price of said tract by tacking to it a very valuable right of way through respondent's said property and a tract of valuable bottom land and river frontage on deep water, caused to be prepared and filed an amended bill in said last-named cause falsely alleging that said last-named parcels were included in his purchase under said decree of 1861, and that there was error in his said deed in this respect, praying the same might be reformed and said Winifried Company be made defendant. Respondents further say that on the same day, without any service of process upon said company, there was filed in said cause a paper purporting to be the answer of the said company, confessing said amended bill, which paper respondents are advised and believe was prepared & filed at the instance of the said Cram & the parties interested with him without the knowledge and consent of said company, & for the fraudulent purposes aforesaid of enhancing the price of said 10,180-acre tract of land by making it appear as though the afore-
94 said right of way and valuable river frontage and shipping point was part and parcel of his said property.

Respondents further say that afterwards, to wit, on the — day of ——, 1880, a decree was entered, as they believe and charge, through the fraudulent procurement of said Cram in said cause upon said amended bill and supposed confession directing the sale of said right of way and frontage as part of the Cram property. Copies of the original & amended bills in said cause, together with the supposed answer of said company & exhibits & decrees, are herewith filed as part of this answer, marked Exhibit "5."

That the said Wright was the purchaser at the sale under said decree & his claim of title is by virtue of said purchase.

Respondents further say that neither they nor their grantor, so far as they are able to learn (he having been long since dead & the bill in said cause next mentioned being lost and misplaced), were parties to said cause of the Bank of Virginia *vs.* said company, and expressly say that none of them were ever parties to said suit of Cram *vs.* Bibby *et als*, or had any knowledge of the same till the sale aforesaid to the said Wright & his claim of title under the same, but allege that all the parties to said suit were alike interested
95 in the enhancement of the price of said 10,180-acre tract and profited by the aforesaid fraud.

They further say that the damages assessed to their grantor, as aforesaid, were not paid by said company prior to the aforesaid sale in 1866, and do not know of its ever having been paid to him, and call for strict proof of same.

They further say that said company never constructed or operated a railroad as contemplated by its said charter, and never provided or kept in repair such road, cars, and accommodations as were required by their act aforesaid & its said charter; that in fact it did not begin the construction of said road till more than two years next after the date of its said charter; that then it only constructed a short coal railroad from its mines to the river, less than six miles long, for the sole purpose of shipping its own products to the river, there being no towns, villages, depots, or stations along the same other than the points for loading at said mines and unloading at the river, no cars run or other accommodations provided upon said road other than coal cars, and no provision or accommodation of any kind or character, even of coal cars, for the public or any others than itself; that shortly afterwards said company became
96 insolvent and the operation of said mines and railroad were wholly abandoned, to wit, long before said sale of the 10,180-acres tract in 1865, and immediately after said sale, to wit, in the year 1869, all the rolling-stock and all rails, cross-ties, & appurtenances were removed and sold and said railroad totally and absolutely abandoned, & the road-bed & frontage from that time till the institution of the suit has been farmed & under cultivation.

That the said company was finally wounded up in the suit last aforesaid, &c., and ceased to be at the time of said sale. That said Cram never at any time operated or attempted to operate said railroad or provided any means of conveying the public upon said road or carrying freight—in fact, there has been neither depot, locomotive, car, rail, or cross-ties upon said road-bed or frontage since the year 1869, but on the contrary a considerable portion has ever since been under respondents' or their grantors' fence in cultivation and the residue put to such ordinary uses as such land is susceptible of, respondents holding and claiming the same under their aforesaid deed.

Respondents deny that said company ever acquired any right or title by the aforesaid condemnation proceedings, but were such
97 the case respondents charge that any right or title so acquired revested to and reverted in the grantor of respondents upon the failure of said company to construct said road within the time and provide the accommodations for the public required by law, and especially after the abandonment of said road in 1869 & the removal of rolling-stock & rails and the continuance of said abandonment and non-user for a greater period than three years. Respondents say that neither Commonwealth of Virginia or the State of West Virginia ever operated or maintained said railroad.

Respondents further say they are advised, believe, & charge that the circuit court of Kanawha by its decrees in the aforesaid creditor's suit has in effect decided and adjudged that said company had no right or title to the parcels of land in controversey in this suit.

Respondents deny that the said Cram ever purchased or that the decrees in said cause ever authorized the sale of said parcels of land now in controversy, and further deny that there is any mistake or omission in his said deed, but charge that said proceeding in the case of Cram *vs.* Bibby in relation thereto & adjudging the parcels to be sold as part of the Cram property was the result of a fraudulent scheme concocted & carried out by the parties to said suit for their personal gain.

98 Respondents further say that said parcels of lands, road-bed, & river frontage so in controversy in this suit were, for forty years prior to the date of the conveyance to respondents, the property of their said grantor, & none other, & were by him conveyed to them by said deed; that during all said period said land was regularly charged to said grantor, & since to respondents, with taxes upon the land-books of Kanawha county for each & every year, & all taxes charged or charg-able thereon fully paid & satisfied; that said parcel of land, road-bed, & frontage was never charged upon said books for any year whatsoever to the said company, or any of its grantees, nor any taxes paid in by them or in their name.

Respondents therefore charge that if any title or color of title ever vested in said company, or its vendees, that the same became forfeited for non-entry & vested in the State of West Virginia, and, in such case, by virtue of the payment of the taxes aforesaid, assessed against respondents & their grantor, such title or color of title was transferred to & vested in them.

Respondents further say that their possession was coextensive with their deed, and actual and adverse to the world, except

99 as to a small tenement-house and lot adjoining same, up to the date of the service of process in this suit and the order of injunction made therein; that since said service and under the protection afforded him from suit or interference by said injunction the said Wright has entered upon, and has ever since been, and now is, continuously tresspassing upon, respondents' said parcel of land, to their great injury and damage.

Respondents are not advised of the great "wealth," "experience," "energy," "enthusiasm," or "alacrity" of Mr. Theodore Wright or his associates, or of their subsequent "disgust," or of the immense sums of money he has expended or proposes to expend upon said property or has lying idle in bank, nor of the fearful and irreparable injury and damage which he says will result to him by reason of his purchase of this bogus title. Respondents, for his sake, regret that his extreme "alacrity" should have hastened him into a purchase of such magnitude without allowing him time for due examination. His appeal should be to and his redress against those of whose fraud he is the victim. The cause in which he made his purchase exhibits the deed to Henry A. Cram, and the evidence of the fraud is upon the face of every paper.

Respondents again specifically deny—

1st. That the Winifrede Mining & Manufacturing Com-

100 pany ever acquired any title to said parcel of land, road-bed,

or river frontage in controversy in this suit by condemnation or otherwise.

2d. That Henry A. Cram ever acquired the same by judicial sale or otherwise, as charged in the bill.

3d. That the plaintiff by his said purchase or in any manner acquired a good and valid title or any title whatsoever to the same.

4th. That the said Cram, or any one under him, have had possession of the same, except as hereinbefore excepted.

5th. That said John McConiha, Sr., was party to said cause of the Bank of Va. *vs.* the Winifred M. & M. Co., or that he set up or claimed the judgment in said suit for the damages assess- for said right of way & river front, or that the decrees in said cause declared that the same had been paid or that the same was paid. But respondents say that it is immaterial for the purposes of their title whether the said judgment was paid out of the purchase-money paid by Cram or in any other way.

That in any event by the non-user of said property for the purposes of public utility the same reverted back to the said grantor and became absolutely vested in him and passed by his said deed to respondents. Respondents especially calls the attention of
101 the court to the finding of said commission, wherein they in substance say that they took into consideration the advantages said railroad would be to the coal and timber lands of the proprietor in reduction of the damages sustained, which great and important consideration has wholly failed by the failure to construct & operate the road contemplated by its charter & the subsequent total abandonment of the same, which exemplifies the reason & wisdom of said act of 1837.

Respondents say that they hold said parcel of land as grantees of said John McConiha, Sr., in the deed aforesaid, and deny that they claim it as his heirs-at-law, and further deny that the said John H. McConiha has any right, title, or interest of any kind or character in said property in controversy in this suit or any part of said land embraced in said deed.

Respondents further say that the said Cram and the said Wright claim said property solely as private individuals and in no sense are corporations or successors of the said Winifred Company.

And these defendants deny that there is any other matter, cause, or thing in said complainants said bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently confessed, traversed,
102 and avoided or denied — is not true, to the knowledge and belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JAMES D. McCONIHAY & OTHERS, Respondents.

By Counsel.

J. H. & J. F. BROWN,
FERGUSON & WILSON,
Solicitors for Defendants.

UNITED STATES OF AMERICA, }
District of West Virginia, } *ss:*

James D. McConiha, being duly sworn, does depose & say that he is one of the defendants named in the foregoing answer subscribed by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he verily believes them to be true.

JAMES D. McCONIH-Y.

Subscribed and sworn to before me this 18th day of November, 1881.

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

103 The act of the General Assembly of Virginia referred to in the foregoing answer on page 89 is in the words and figures following, to wit:

Chap. 261. An act to incorporate the Winifred- Mining and Manufacturing Company (passed February 16, 1850).

1. Be it enacted by the General Assembly of Virginia, That Gouvernear S. Bibby, William O'Connor, Richard Oakley, and Henry Eagle, Junior, and such other person or persons as may be hereafter associated with them, shall be, and they are hereby, incorporated and made a body politic and corporate under the name and style of "Winifred- Mining and Manufacturing Company," for the purpose of exploring, digging, mining, raising, and transporting coal and other minerals and substances, and for manufacturing mineral, vegetable, and other articles in and from the counties of Kanawha and Boone and such other counties as may hereafter be created out of parts of said counties, and they are hereby invested with all the rights, privileges, and powers conferred on such bodies politic and corporate by an act entitled "An act prescribing general
104 regulations for the incorporation of manufacturing and mining companies," passed February the thirteenth, eighteen hundred and thirty-seven, and shall be subject to all the rules, regulations and restrictions provided and prescribed by said act, so far as they are applicable to and not inconsistent with the powers and privileges herein contained and granted.

2. Be it further enacted, That the capital stock of the said company shall not be less than one hundred thousand dollars, nor more than one million five hundred thousand dollars, to be divided into shares of one hundred dollars each; and the said company shall have the right to purchase and hold lands not exceeding ten thousand acres at any one time, in the said counties of Kanawha and Boone, or in any new counties that have been or may hereafter be formed and created out of parts of the said counties.

3d. That it shall and may be lawful for the said company to erect and construct a slack-water navigation from some convenient

105 point on Kanawha or Coal rivers, contiguous to their said lands, and along the bed of the said Coal river to the Great Kanawha: Provided, however, That nothing in this act contained shall be so construed as to prevent the said rivers from being and remaining public highways, free for the navigation of all the citizens of this Commonwealth; and also to construct such railroad or railroads from any point on their said lands to the Great Kanawha river, or any other navigable stream in the valley of the Kanawha river and its branches, or to connect with any other railroad or improvement which is now or may hereafter be authorized by the State of Virginia in the said valley of the Kanawha and its branches; and to enable the said company to carry out the provisions in this section contained they are hereby invested with all the rights, powers, and privileges, and subjected to all the limitations and restrictions contained in an act entitled "An act prescribing certain general regulations for the incorporation of railroad companies," passed March the eleventh, eighteen hundred and thirty-seven, so far as the same are applicable to and not inconsistent with the provisions of this act.

4. This act shall be in force from its passage.

106 An abstract of which act, passed March 11, 1837, aforesaid, is in the words and figures following, to wit:

Chap. 118. An act prescribing certain general regulations for the incorporation of railroad companies.

* * * * * * *

2. The books for receiving subscriptions to the capital stock of the company shall be opened at such time and places as shall be authorized by the act of incorporation, and under the direction of commissioners designated in said act; thirty days' notice of the time and places of receiving subscriptions shall be advertised in some newspaper printed nearest the general route of the contemplated railroad, and in such other places as the commissioners may direct, and the books of subscriptions shall not be closed in less than ten days. If it shall appear more than the whole capital stock has been subscribed for within the said ten days it shall be the duty of the commissioners, at the place first named in the act of incorporation, or a majority of them, to reduce the number of shares sub-

107 scribed for amongst the subscribers in fair and equal proportions to the amount of stock subscribed for respectively, by each until the suscriptions shall be equal to the capital stock of the company. But if the whole number of shares shall not have been subscribed for within the said ten days then the books may be continued open, or closed and reopened from time to time, with or without further notice, as a majority of the commissioners first named in the act of incorporation shall judge to be most expedient, until the whole number of shares shall have been subscribed for.

* * * * * * *

7. The company are hereby invested with all the rights and powers necessary for the construction, repair, and maintaining of

their railroad, to be constructed with as many sets of tracks as they may deem necessary, and also to make and construct all works whatsoever which may be necessary and expedient in order to the proper completion of such railroad.

* * * * * * *

108 11. When the said freeholders shall have agreed upon the amount of damages they shall forthwith make a written report of their proceedings, under their hands and seals, in substance as followeth:

"We, —— ——, freeholders, appointed by an order of the county court of —— for the purpose of ascertaining the damages which would be sustained by —— ——, the proprietor of certain lands in the said county, which the president and directors of the —— company propose to condemn for their use, do hereby certify that we met together on the land aforesaid on the — day of ——, the day appointed therefor by the said order (or the day to which we were regularly adjourned from the day appointed for our meeting by the said order), and that having been first duly sworn, and having viewed the premises, we proceeded to estimate the quantity and quality of the land aforesaid, the quantity of additional fencing which would probably be occasioned by its condemnation,
109 and all other inconveniences which seemed to us likely to result therefrom to the proprietor of said land; that we combined with these considerations, as far as we could, a just regard to the advantages which would be derived by the proprietor of said land from the construction of the railroad for the use of which the said land is to be condemned; that under the influence of these considerations we have estimated and do hereby assess the damages aforesaid at the sum of ——.

"Given under our hands and seals this — day of ——."

* * * * * * *

20. The works of the company shall be executed with diligence, and if they be not commenced within two years after the passage of the *the* act of incorporation, and finished within the period which may be therein prescribed, and in case the company, at any time after the said road is completed, shall abandon the same, or cease to use and keep it in proper repair, so that it shall fail to afford the intended accommodation to the public for three successive years, then, and in that case also, their charter shall be annulled as
110 to the company, and the State of Virginia may take possession of said railroad and works, and the title thereto shall be vested in the said State so long as it shall maintain the same in the state and manner required by said charter; otherwise the lands over which the said road shall pass shall revert to and be vested in the person or persons from whom they were taken by concession or inquisition, as aforesaid, or their heirs or assigns.

* * * * * * *

The deed referred to in the foregoing answer of James D. McConiha & others, by which the Winifred Mining & Manufacturing

Co. acquired a tract of land containing about 10,180 acres under its charter, is in the words and figures following, to wit:

This indenture, made the 8th day of January, in the year one thousand eight hundred and fifty-three, between G. T. Snow, trustee, of Richmond county, State of New York; Gouve-neur S. Bibby, of the city of New York, and Justine, his wife; Richard Oakley,
111 of said city, and Catharine P., his wife; Henry Eagle, of said city, and Minerva, his wife; Edwin Van Antwerp, of Newark, New Jersey, and B. L. Antwerp, his wife; Edward A. Bibby, of the city of New York; John Devereux, of the city of Philadelphia, and Helen, his wife; Eliza W. O'Connor, of the city of Brooklyn, State of New York; and the said Eliza W. O'Connor and I. Eugene Berard, of said city of Brooklyn, the committee of William O'Conner, a lunatic, parties of the first part, and the Winifrede Mininga nd Manufacturing Company of Virginia, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar and other valuable considerations them hereunto moving, to them in hand paid by the said Winifrede Mining and Manufacturing Company of Virginia at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, and quit-claim-, and by these presents do remise, release, and quit-claim to the said The Winifrede Mining and Manufacturing Company of Virginia, and to their successors and assigns, forever, all their right, title, and interest of, in, and to that certain tract or parcel of land containing thirteen thousand five hundred and twenty-five acres (13,525), as
112 now ascertained by surveys made by Abel P. Sinnett, surveyor of Kanawha county, dated June 1st, 1852, being part and parcel of ninety-three thousand and twenty-six acres and a half granted by the Commonwealth of Virginia to Robert B. James, deceased, Frederick Mollineaux, and John Pollock, by patent bearing date the 21st day of August, one thousand eight hundred, which tract of land is situate in Kanawha county, in said State of Virginia, on the waters of the Kanawha and Coal rivers, and was granted to the said James, Mollineaux, and Pollock, and their heirs, as tenants in common in unequal quantities, to wit: To the said Robert B. James, dec'd, fifty-nine thousand and seventeen acres and a half; to the said Frederick Mollineaux twenty-eight thousand three hundred and eighty acres and two-thirds, and to the said John Pollock five thousand seven hundred acres.

And also all the right, title, and interest of the said parties of the first part to the portion of the said tract formerly the property of the said Frederick Mollineaux, described in a certain deed of partition of the said tract dated July 16th, one thousand eight hundred and nineteen, filed in the office of the clerk of Kanawha county
113 for record August 21st, one thousand eight hundred and nineteen, as follows: Beginning on Field's creek where the line of the survey of ninety-three thousand and twenty-six acres and a half crosses the same; thence up the said creek, following its meanders and joining and running with the lines of a survey and

sale made by Samuel D. Honeyman in his own right and as attorney to Leonard Morris, Charles Morris, and Andrew Donnally, junior, and dated the 29th day of June, one thousand eight hundred and eighteen, to the main head of said Field's creek, to a corner of the said Charles and Leonard Morris and Andrew Donnally, junior, situate on the top of the dividing ridge between the waters of Cole river and Kanawha river; thence a straight line to the mouth of Three-Mile creek, above the house of Poindexter Toney, on the north fork of Cole river; thence up said fork of Cole river to the mouth of Joe's creek, on the line of the original survey; thence up Joe's creek with the lines of the original survey; thence with the same lines to Slaughter's creek; thence with the same lines down Slaughter's creek to near its mouth, upon the Kanawha river, to a corner of the original survey; thence with the lines of the said original survey to Field's creek, the place
114 of beginning; said tract of thirteen thousand and five hundred and twenty-five acres being subject to a deduction for prior claims for fifteen hundred and seventy-four acres, and also saving and excepting therefrom nineteen hundred and fifty-one acres, to be cut off from the most southerly parcel of said tract of thirteen thousand five hundred and twenty five acres by a due east and west line, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; also all the estate, right, title, and interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the above-described premises, any, every part and parcel thereof, with the appurtenances, to have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said The Winifrede Mining and Manufacturing Company of Virginia, their successors and assigns, forever.

115 In witness whereof the said parties of the first part have hereunto set their respective hands and seals the day and year first above written in the city of New York.

G. T. SNOW, *Trustee.* [SEAL.]
GOUVR S. BIBBY. [SEAL.]
JUSTINE BIBBY. [SEAL.]
RICHARD OAKLEY. [SEAL.]
CATHARINE P. OAKLEY. [SEAL.]
HENRY EAGLE. [SEAL.]
MINERVA EAGLE. [SEAL.]
EDMUND VAN ANTWERP. [SEAL.]
B. T. VAN ANTWERP. [SEAL.]
EDWARD A. BIBBY. [SEAL.]
JOHN DEVEREUX. [SEAL.]
HELEN DEVEREUX. [SEAL.]
ELIZA W. O'CONNER. [SEAL.]
ELIZA W. O'CONNER, *Committee.* [SEAL.]
I. E. BERARD. [SEAL.]

Signed, sealed, and delivered in presence of—
MOSES B. MACLAY.
WILLIAM MARTIN.

(Acknowledgments omitted.)

Exhibit No. 3 referred to in the foregoing answer, being deed dated June 25, 1870, from commissioner to Henry A. Cram, is in the words and figures following, to wit:

116 "This deed, made this 25th day of June, 1870, between T. B. Swann, special commissioner, of the first part, and Henry A. Cram, of the second part, —: Whereas the said commissioner, in pursuance of the authority vested in him by a decree of the circuit court of the county of Kanawha, Virginia (now West Virginia), made on the 31st day of January, 1861, in a suit in chancery therein pending in which the Bank of Virginia & *als.* were complainants and Winifrede Mining and Manufacturing Company & *als.* were defendants, did sell the real estate hereinafter mentioned & conveyed according to the terms & conditions required by said decree, at which sale the said Henry A. Cram became the purchaser for the sum of $80,000; and the said court having by a subsequent decree made in the cause confirmed said sale, & by a further subsequent decree made on this day reciting the payment in full of the $80,000 aforesaid & all interest thereon directed a deed for said real estate to be made to said Cram by the said commissioner:

"Now, therefore, this deed witnesseth; That the said T. B. Swann, special commissioner as aforesaid, has this day granted and conveyed unto the said Henry A. Cram the following real estate
117 situated in the county of Kanawha & State of West Virginia, & bounded and described as follows, to wit: 10,180 acres of land lying on Field's creek, south side of Kanawha river, & Slaughter's creek, & extending to the bluffs of Cole river, as laid down upon the surveyor's map filed in this cause, & for many years the property of the Winifrede Mining & Manufacturing Company, as fully shown by their deed of record in the recorder's office for Kanawha county, West Va., & bounded as follows, to wit: Beginning on Field's creek, where the line of said survey of 93,026½ acres crosses the same; thence up said creek with its meanders & joining & running with the lines of a survey & sale made by the said S. D. Honeyman in his own right & as attorney as aforesaid to L. Morris, Ch. Morris, & A. Donnally, Jr., & others, 29 June, 1818, to the main head of Field's creek, to a corner of s'ds Ch. & L. Morris & A. Donnally, Jr., situated on the top of the dividing ridge between the waters of Cole river & Kanawha; thence with a straight line to the mouth of 3-Mile creek above the mouth of P. Toney on N. fork of C. river; thence up the said north fork of Cole river to the mouth of Goose creek on the line of the original survey; thence up Goose creek with the line of the original survey; thence with said line
118 to Slaughter's creek; thence with said line down Slaughter's creek to near its mouth upon Kanawha river to a corner of the original survey; thence with the line of the said original survey

to Field's creek, the place of beginning, reserving from the said boundaries 1,951 acres, the property of G. L. Biby, on Goos- creek, & the Pinkny 500 acres, to have and to hold the said real estate & premises, with all the right, title, & interest of the Winifrede Mining & Manufacturing Company, unto said Henry A. Cram, his heirs and assigns, forever.

"T. B. SWANN, [SEAL.]
"*Special Commissioner.*"

STATE OF WEST VIRGINIA, *Kanawha County:*

RECORDER'S OFFICE, *25th June*, 1870.

This deed was this day presented to me in this office and duly acknowledged by Thomas B. Swann, special commissioner, party thereto, and the same being stamped to the amount of $7.50 for & on account of the sum of $7,500 of the purchase-money paid at the date of purchase. And I further certify that the bonds, five in number, for the residue of the purchase-money, for $14,500 each, are each of them stamped to the amount of $14.50, making in the ag-
119 gregate $72.50. The same is thereupon admitted to record.

Teste: A. CUNNINGHAM, *Rec'r.*

A Copy.
Teste: JOEL S. QUARRIER,
Clerk Kanawha County Court.

"Notice of Sale" (Exhibit No. 4) referred to in the said answer not found in the papers; hence not here inserted.

The following map is a copy of the paper referred to in said answer as "Exhibit A" and made part of this answer:

(Here follows diagram marked p. 120.)

121 The bill referred to in the foregoing answer of James D. McConihay & othe-s as Exhibit No. 6 is in the words and figures following, to wit:

To the Honorable David McComas, judge of Kanawha circuit court:

Humbly complaining show unto your honor your orators, the president, directors, and company of the Bank of Virginia, the James River and Kanawha Company, George Miller, James C. McAndrew, William R. Travis, Richard Oakley, John Devereaux, and Edmund H. Miller:

That at the spring term of your honor's court, 1856, your orators, the president, directors, and company of the Bank of Virginia, recovered judgment against the Winnifrede Mining and Manufacturing Company, a company incorporated by act of the General Assembly of Virginia, for $4,000, with interest, costs, and damages, and that at the same term of said court the president, directors, and company of the Bank of Virginia recovered against the said Winnifrede Mining and Manufacturing Company the further sum of $3,900, interest and costs and damages.

That at the spring term of said court, 1859, your orator, Richard Oakley, recovered judgment against the said Winifriede Mining

122 and Manufacturing Company for $10,350, interests and costs to be discharged by the payment of $5,175, interests and costs aforesaid.

That at the August term, 1857, of Kanawha county court the James River and Kanawha Company recovered a judgment against the Winifrede Mining and Manufacturing Company for $1,845.57, interests and costs.

That at the special term of your honor's court held for Kanawha in 1860 your orator George Miller recovered judgment against the Winifrede Mining and Manufacturing Company for $7,278.76c. and the costs, $6.95, to be discharged by the payment of $3,639.38c., with interests and costs aforesaid, and that at the same time your orator James C. McAndrew recovered a judgment against the Winifrede Mining and Manufacturing Company for $24,896.60 and costs, $6.95, to be discharged by the payment of $12,448.30 and interests and costs aforesaid.

That at the same term William R. Travis obtained a judgment against the Winifred- Mining and Manufacturing Company for $18,910.84c. and costs, $6.95, to be discharged by the payment of $9,455.42c., interest & costs.

That at the same term your orator Richard Oakley recovered a judgment against the Winifrede Mining and Manufacturing
123 Company for $8,993.78c. and costs, $6.95, to be discharged by payment of $4,496.87c., interests and costs aforesaid.

That at the same term your orator John Devereaux recovered a judgment against the Winifrede Mining and Manufacturing Company for $18,370 and costs, $6.95, to be discharged by the payment of $9,185.00, interest and costs aforesaid.

And that at the same term your orator Edmund H. Miller recovered a judgment against the Winifrede Mining and Manufacturing Company for $18,185.22c and costs, $6.95c., to be discharged by the payment of $9,092.61c., interest and costs aforesaid.

Copies of all these judgments are herewith filed and prayed to be read as parts of this bill.

Upon all the foregoing judgments executions were duly issued and placed in the hands of the sheriff of Kanawha for collection and were by him returned, No property found. Copies of all these executions and returns are herewith filed and prayed to be taken and read as parts of this bill.

Your orators further show unto your honor that they have wholly failed to make their debts in a court of common law, and that they are still due and unpaid and liens upon the lands of the sole-
124 defendant, the Winifrede Mining and Manufacturing Company.

Your orators further represent unto your honor that George Jeffries, John McConihay, William Dickinson, & Joel Shrewsbury, partners in trade, using the name of Dickinson and Shrewsbury, hold jointly and severally large unpaid judgments against the Winnifrede Mining and Manufacturing Company, copies of which are filed with this bill, together with executions and returns thereon

by the sheriff of "No property found," and prayed to be taken as parts thereof.

That Joel Shrewsbury has departed this life, leaving by last will Dickinson, Shrewsbury, and William A. Quarrier his executors; that said Dickinson refused to act and William A. Quarrier qualified as sole executor. (See order of appointment and qualification herewith filed). That on the 29th of December, 1854, the Winifrede Mining and Manufacturing Company executed a trust deed upon their locomotive then and now used in shipping and transporting coal, in trust, to secure Henry H. Wood and Samuel H. Early, sureties for John R. Garland, in two supersedeas bonds, executed by said Garland as responsible person for said company—the one to Wm. Dickinson and Joel Shrewsbury and John McConihay and
125 the other to John McConihay. Major A. Parks was named trustee in the deed. The bonds named in the trust were never sued on and nothing was ever done under the trust. Dickinson, Shrewsbury, & McConihay gained their cases in the court of appeals. See copy of trust deed filed.

Your orator now further shew unto your honor that the Winifred- Mining & Manufacturing Company owns some 10,000 acres of land lying mostly in the county of Kanawha, but partly in the county of Boone, Va., which lands are fully set out and described in a deed for the same from G. T. Snow & others to the defendant, the Winifred- Mining & Manufacturing Company (a copy of which is herewith filed as part of this bill, marked X). Your orators are advised that their judgments are a lien upon the lands of the defendant, the Winifred- Mining and *Mining* Company, and that said lands are liable to sale or rent to pay the same and that a court of equity is the proper place in which to enforce this lien. Your orators now further shew unto your honor that on the 1st day of July, 1855, the defendant, the Winifrede Mining and Manufacturing Company, wishing to borrow money, executed to James J. Ring, of New York, a trust deed upon their estate aforesaid, and also upon the personal property, to wit, engines, locomotives, cars, picks, &c., &c.,
126 used in mining and transporting coal upon the property. This trust was recorded in the clerk's office of Kanawha county court, and a copy is filed with this bill, marked "Q." The meeting which ordered the trust was held in New York and not in Virginia, and the trust deed was executed wholly in New York and not in Virginia, and the seal of the company was affixed to the trust in the State of New York and not in Virginia. None of the bonds contemplated upon the face of the trust were ever issued, and no money was ever raised under it, and no vested rights have ever been acquired under their trust by anybody. In the meantime your orators have acquired a lien upon the land and they are advised that the trust is null, void, and inoperative, and is so regarded by the said Winifred- Mining and Manufacturing Company, its creditors, agents, and all others; that no body at this day claims anything under the trust; that the trust deed was imperfectly executed and is void on that account; that no deed can be executed by a corporation or incorporated company to bind lands, unless wholly made, executed,

and sealed in the sovereignty in which the company was incorporated, because such incorporated companies have no legal existence outside of that sovereignty in which it was created; that
127 James J. Ring, the trustee, has departed this life, and that his heirs-at-law are unknown to your orators; he never married and was childless; that by a provision in the trust it was specified that in case said Ring should die, resign, &c., then that the supreme court of the State of New York might appoint in his place a new trustee, being a resident of that State, &c. In pursuance of this provision, after the death of said Ring, the supreme court of New York did appoint John P. Crosby, of New York, to fill the vacancy in this trust as trustee in the room and stead of J. J. Ring, dec'd.

(See the appointment evidenced by office copy from the sup. c't of New York herewith filed as part of this bill, marked "C.")

Your orators are advised that they have new vested rights; they are further advised that the lands will not pay but very little, and by no means enough to pay your orators' judgments in five years, and that they ought to be sold, and to this end they pray that the Winifred Mining & Manufacturing Company, Andrew Parks, John R. Garland, Samuel H. Early, Henry H. Wood, George Jeffries, the unknown heirs-at-law of James J. Ring, dec'd; John P. Crosby, John McConihay, William Dickinson, survivor of himself and Joel Shrewsbury, dec'd; Dickinson, Shrewsbury, William A. Quarrier,
128 as executor of Joel Shrewsbury, dec'd, may be made parties defendants to this bill and answer the same according to law; that the court will order all proper accounts to be taken and will direct the lands of the company to be rented or sold to pay your orators' debts aforesaid, interest and costs and damages and the costs of this suit, and that the court will grant unto your orators all such other, further, and general relief as is consistent with equity and good conscience and to the court may seem meet.

And, as in duty bound, your orators will ever pray, &c. Wherefore, &c.

THE PRESIDENT, DIRECTORS, & COMPANY
OF THE BANK OF VIRGINIA,
T. B. SWANN, *Sol.*
THE JAMES RIVER & KANAWHA COMPANY,
GEORGE MILLER,
JAMES C. McANDREW,
WILLIAM R. TRAVIS
By T. B. SWANN, *Their Counsel.*

Exhibits "5," referred to in the foregoing answer of James D. McConihay & others, are in the words and figures following, to wit:

Bill.

The bill of complaint of Henry A. Cram against Edward A.
129 Bibby, William H. Bibby, Alfred Bibby, Edmund H. Miller, William R. Travis, James C. McAndrew, and James C. McAn-

drew as trustee for certain unknown parties; John Gillespie, Henry A. Oakley, John Devereux, Edwin A. Van Antwerp, John R. Garland, John E. Develin, Henry Eagle, James Brand, N. Dan Ellingwood, George J. Miller, John A. Lowery, and William M. Alllen, as executors of the will of John Lowery, deceased; Caroline S. Lowery, as executrix of the will of John Lowery, deceased; Margaret B. Crosby, William B. Crosby, and Henry Ashton Crosby, as executors of John P. Crosby, deceased; George H. Forster, as administrator of William May, deceased; Frederick Oakley, as administrator of Richard Oakley, deceased, and the unknown heirs or legal representatives of Alexander Gillespie, deceased.

Filed in the circuit court of Kanawha county.

The plaintiff complains and says that at a circuit court held for Kanawha county on or about the 26th day of January, 1861, in a suit in chancery of the Bank of Virginia and others, Complainant, *vs.* The Winifred- Mining and Manufacturing Company and others, defendants, and John P. Crosby, trustee, complainant, *vs.* the same company and others, defendant-, on cross-bill, a decree was duly
130 made and entered providing, among other things, for the sale at public auction to the highest bidder, at the front door of the court-house at Kanawha county, of certain real estate and other property therein described as follows, to wit: that 10,000-acre tract of land belonging to the Winifrede Mining and Manufacturing Company, fully set out and described in the bill and exhibits and other proceedings in these causes, and lying on Kanawha and Coal rivers and on Field's creek and in the counties of Kanawha and Boone, together with all the improvements thereon used in the mining, transporting, and shipping coal, including railroad iron, picks, shovels, cars, engines, and whatever other tools and implements that may be upon the property belonging to said company, which said premises so to be sold are hereinafter more particularly described.

That the said decree further provided that the said sale of the said premises should be made upon the following terms, to wit: $7,500 in cash and one-fifth part of the residue in six months, and the residue in 1, 2, 3, and 4 years' equal instalments, and for all the deferred payments the commissioner is required to take from the purchaser or purchasers bonds with good personal security, bearing interest from date, and to retain the title of the land as a further security.

131 That the said decree provided for the payment of a large number of claims, judgments, and liens upon the said premises out of the moneys arising from the sale of the said premises, and determined the order in which the said claims should be preferred and the said payments should be made.

That thereupon, in the city of New York, and on or about the 20th day of October, 1865, Edward A. Bibby, Frederick Oakley, administrator of Richard Oakley; Henry A. Oakley, John Lowery, Governeur S. Bibby, James C. McAndrew, Edmund H. Miller, James Brand, Henry Eagle, William R. Travers, John P. Crosby, William May, John Gillespie, the estate of Alexander Gillespie by James C.

McAndrew, as attorney, and George J. Miller entered into an agreement with N. Dane Ellingwood and this plaintiff, which said agreement, after reciting the said decree and that certain of the said parties had claims unpaid against the said Winifrede Mining and Manufacturing Company, some of which were preferred by the said decree hereinbefore mentioned, authorized the said N. Dane Ellingwood and this plaintiff to purchase the said premises at the said sale for and in behalf of the parties to the said agreement,
132 provided, however, that they should not be made liable beyond the aggregate amount of such of their said claims as should be allowed or received in payment of the consideration money, and the further sum of $7,500 in cash, which they agreed to advance, contributing to raise the said sum proportionately among themselves, according to the amount of their respective claims, should it become necessary to make such advance in order to complete the said purchase, and for compensation to the said N. Dane Ellingwood and this plaintiff for their services in going from New York to Charleston to attend the said sale, and in making the said purchase they agreed that the said N. Dane Ellingwood and this plaintiff should have an one-tenth interest in the property purchased, in addition to any other interest they might have or should otherwise acquire as joint purchasers of the said premises, and that in case no purchase should be made under the said agreement, then this plaintiff and the said N. Dane Ellingwood should have an one-tenth interest in the total amount received by the said parties from the proceeds of the said sale.

That thereupon this plaintiff went from the city of New York to Charleston, West Virginia, to attend the said sale, with direc-
133 tions to bid at the said sale up to a limit that would be communicated to him by telegram from the said N. Dane Ellingwood previous to the said sale; that the said telegram was duly received and this plaintiff attended the said sale, and on or about the 26th day of October, 1865, purchased the said premises under the agreement hereinbefore mentioned for the sum of eighty thousand dollars, which sum was within the limit named in the said telegram; that in making the said purchase this plaintiff had no power to bind the said parties to the full extent of the purchase-money, and that this plaintiff had been informed that the amount of the preferred claims held by the said parties, together with the sum of $7,500, to be contributed as above mentioned, was enough to cover the amount of the said purchase-money, and having been directed to make the said purchase in his own name this plaintiff gave his own name as purchaser at the said sale, as he had been requested and instructed to do.

That the first payment of $7,500 in cash was duly made, in accordance with the terms of the said sale, by the defendant, N. Dane Ellingwood.

That the money to make this payment was contributed by certain
134 of the parties to this agreement, hereinbefore mentioned, this plaintiff making the largest contribution to the said sum, viz., about one-third of the entire amount.

That at the time of the said sale this plaintiff was required in accordance with the terms of the said decree to execute personally bonds for all the deferred payments, amounting to $72,500, with interest from the date of the sale, which bonds were duly executed by the said plaintiff and by the said N. Dane Ellingwood as surety.

That afterwards and before December, 1867, some further contributions were made towards the payment of the purchase-money by this plaintiff and some of the parties to the said agreement through the defendant, N. Dane Ellingwood.

That the application (in payment of the said purchase-money) of the interest in the said claims, judgments, and liens belonging to the parties to the said agreement and of certain other parties who are also joined as defendants in this action, for whom the said Ellingwood acted in making such application, was attended to, by the said N. Dane Ellingwood, who had charge thereof; that the said appplication was made by the said Ellingwood on the 4th day of May, 1866; that this plaintiff was at that time and for some years thereafter entirely ignorant of the respective interests in the said
135 claims, judgments, and liens, but knew, and was informed of the fact, that said application was made on the 4th day of May, 1866, and that the amount thereof was $27,294.19.

And this plaintiff further shows that up to November 2d, 1867, there had been paid the following amounts and no more on account of the purchase-money:

Cash at the time of purchase, Oct. 26, 1865	$7,500
" May 4th, 1866	2,064 06
in judgments, liens, and claims, May 4, 1866	27,294 19
Cash, September 22nd, 1866	1,572 30
" November 1, 1867	744 75
	$39,175 30

That all of the said payments were made by the said N. Dane Ellingwood from the said cash contributions and the said interest in said claims, liens, and judgments in his hands, without any participation on the part of this plaintiff, excepting that he had paid the said Ellingwood on account of the said cash payment in all the sum of $4,116.91.

That the said Edmund H. Miller and James C. McAndrew had claims or liens on or interests in the judgments in favor of George Jeffries mentioned in the said decree; that the said N. Dane Ellingwood at some time after November, 1867, arranged and settled the amount of the said claims, respectively, and this plaintiff, on
136 the order of the commissioner appointed by the said decree, paid directly to the said Edmund H. Miller on the 12th of January, 1870, the sum of $6,545.67, and received credits therefor from the said commissioner as for so much money paid on account of the purchase-money paid for the said premises by the said plaintiff.

That the said N. Dane Ellingwood settled the claim of the said James C. McAndrew on the said judgments in favor of George Jeffries at the sum of $7,363.61, and by the direction of the said James

C. McAndrew the said amount was applied in part payment of the purchase-money, and the said James C. McAndrew became interested in that amount in the purchase, in addition to the amount of his interest of $4,241 thereon, hereinafter stated.

That excepting this last-mentioned application by James C. McAndrew, and excepting as hereinbefore stated, none of the parties to the said agreement nor of said defendants have ever paid anything on account of the said purchase-money or on account of the said premises or the disbursements necessarily incurred on account thereof, or on account of this plaintiff's compensation, to be paid as is hereinafter more fully mentioned and set forth.

That after November, 1867, when further bonds given on the purchase fell due, no provision was made for their payment, but this plaintiff was left to provide for the same as he best could;
137 that this plaintiff was embarrassed and troubled to meet said judgments; that a suit was commenced against him at one time on one of the said bonds, executed by him, as hereinbefore mentioned, and an application was also made at one time for a resale of the said premises on account on the non-payment at maturity of one of the said bonds.

That, in order to meet the payment of said bonds, this plaintiff procured an order from the said court for the sale of certain railroad iron included in said purchase and on the said premises and for the application of the proceeds of sale on account of the said purchase-money; that this plaintiff accordingly caused the said railroad iron to be sold on or about September 5th, 1868, and applied the proceeds, amounting to $26,190.19, on account of the said purchase-money; that all of the rest of the moneys that became due on account of the said purchase-money this plaintiff was obliged to and did pay on account of the said purchase-money, and that he was obliged to and did make other payments on account of taxes that became due on the said premises; that the last payment was made by him May 12th, 1870; that the total amount of money paid by this plaintiff at different times, in order to complete the purchase of the said premises, was $30,786.00, for which sum this
138 plaintiff became interested as copurchaser in the said premises.

That in addition thereto, by agreement with the said N. Dane Ellingwood, the plaintiff became entitled to $\frac{1}{2}$ part of the $\frac{1}{10}$ part of the said premises agreed to be paid, as hereinbefore stated, to the said N. Dane Ellingwood and the said plaintiff for their services at the said sale—that is to say, $\frac{1}{20}$ part of the said premises.

That afterwards, and on or about the 25th day of June, 1870, when the said purchase-money had been fully paid, as hereinbefore set forth, the said premises were conveyed to this plaintiff by a deed duly executed and delivered to him by T. B. Swann, the special commissioner appointed to sell the said premises in the decree hereinbefore mentioned.

That in said deed the said premises conveyed were described as follows, to wit: The following real estate situated in the county of Kanawha and State of West Virginia, and bounded and described

as follows, to wit: 10,180 acres of land lying on Field's creek, south side of Kanawha river and Slaughter's creek, and extending to the bluffs of Coal river, as laid down upon the surveyor's map filed in this cause, and for many years the property of the Winifred Mining and Manufacturing Company, as fully shown by their deed
139 of record in the recorder's office for Kanawha county, West Va., and bounded as follows, to wit: Beginning on Field's creek, where the line of said survey of 93,026½ acres crosses the same; thence up said creek, with its meanders, and joining and running with the lines of a survey and sale made by the said S. D. Honeyman in his own right and as attorney as aforesaid to L. Morris, Ch. Morris, and A. Donnally, and others 29 June, 1818, to the main head of Field's creek to a corner of s'd Ch. and L. Morris and A. Donnally, Jr., situated on the top of the dividing ridge between the waters of Coal river and Kanawha; thence with a straight line to the mouth of 3-Mile creek, above the mouth of P. Toney, on N. fork of C. river; thence up the said north fork of Coal river to the mouth of Goose creek, on the line of the original survey; thence up Goose creek with the lines of the original survey; thence with said line down Slaughter's creek to near its mouth upon Kanawha river to a corner of the original survey; thence with the lines of the said original survey to Field's creek, the place of beginning, reserving from the said boundaries 1,951 acres the property of G. S. Bibby, on Goose creek, and the Pinkney, 500 acres.

That afterwards John Lowery, one of the parties to the agreement hereinbefore mentioned died leaving a will, which was duly
140 admitted to probate on the 6th day of January, 1869, by the surrogate of the city and county of New York, and that the testator appointed his wife, the defendant Caroline S. Lowery, an executrix of the said will, and his son, the defendant John A. Lowery, and the defendant William M. Allen, executors of the said will, and that letters testamentary were duly issued to the said executrix and executors on or about the 5th day of July, 1869.

The William May, another of the said parties, died, and his interest under the said agreement passed to the defendant George H. Forster, his administrator, and that Go-verneur S. Bibby transferred his interest to the defendants Alfred Bibby, Edward Bibby, and William H. Bibby.

The Alexander Gillespie, as the plaintiff is informed and believes, was a British subject and that his domicile was somewhere in Scotland, but that the name or names of his heirs or legal representatives and all particulars concerning the same are wholly unknown to this plaintiff.

That after the delivery of the said deed and in the month of March, 1871, meetings were held in the city of New York of the parties who had contributed either by money or by their interest in the claims, liens, and judgments mentioned in the said decree, and the respective contributions of all parties who had con-
141 tributed to the said purchase-money was settled, arranged, and agreed upon, a schedule was prepared and drawn up, and it was found settled and agreed that the parties mentioned in the

said schedule, a copy of which is hereto annexed, marked "A," had contributed, either in money or by the application of their interest in claims, liens, and judgments mentioned in the said decree, the sums set opposite to their respective names, excepting that the sum of 4,000 dollars set opposite to the name of N. Dane Ellingwood is the amount of his compensation hereinbefore mentioned, and the sum of 4,000 dollars, part of the sum set opposite to the name of Henry A. Cram, is also for his compensation, as hereinbefore mentioned, and of the sum set opposite to the name of John P. Crosby $360 was also for compensation claimed by him, which said claim was allowed at the meeting herein last above mentioned.

That such of the defendants as were not parties by signing the original agreement hereinbefore mentioned, made before the sale of the said premises, became interested in the purchase by the application of small liens and interests in the judgments mentioned in the said decree, such application having been made by the said N. Dane Ellingwood, acting for them as their attorney-
142 in-fact, and this plaintiff is informed and believes that the said N. Dane Ellingwood had either previous authority or that his said acts in their behalf were duly ratified; that at said meetings in the month of March, 1871, it was settled and agreed that the parties mentioned in the said schedule were the sole parties interested in the said premises, and that they were respectively interested in the sums set opposite to their respective names, and this plaintiff says that he is informed and believes *and* that, so far as he has any knowledge, the said schedule is in all respects a true statement of said respective interests.

And this plaintiff further says the said E. H. Miller, W. R. Travus, J. C. McAndrew, W. H. Bibby, John Gillespie, Frederick Oakley, administrator of the estate of Richard Oakley; George H. Forster, administrator of the estate of William May; John Devereux, E. A. Van Antwerp, J. R. Garland, J. E. Develin, Henry Eagle, E. A. Bibby, James Brand, N. Dane Ellingwood, and J. C. McAndrew, trustee, mentioned in the said schedule, are defendants in this action, and that the defendants Margaret B. Crosby and William B. Crosby and Henry Ashton Crosby, executors of John P. Crosby, deceased, are the legal representatives of the said John P. Crosby mentioned in the schedule, and that the other defendants are the suc-
143 cessors or legal representatives of the remaining interests in the said schedule contained, as hath been hereinbefore more fully stated and set forth.

And this plaintiff says that shortly after the said purchase and in the beginning of the year 1866 it was agreed by the parties hereinbefore just mentioned that this plaintiff should have a reasonable compensation for his services in completing the said purchase and in reference to the said premises and in selling the same, which, together with necessary expenses and disbursements, it was satisfied should be a charge upon the said premises, but it was understood that no personal liability by any of the said parties to this plaintiff was incurred therefor.

And this plaintiff further says that at the said meetings in March,

1871, and afterwards it was further understood and agreed that this plaintiff should endeavor to sell the said premises, and that until such sale he should take charge of and manage the same as the agent for all the parties interested therein, and after such sale should first deduct all his disbursements and just charges, and distribute the proceeds to the parties named in the said schedule hereto
144 annexed in the proportions therein named, and that this plaintiff immediately thereupon delivered to each of the parties mentioned in the said schedule with the exception of two or three parties with small interests, who could not be found, and of G. S. Bibby, who had assigned his interest, as hereinbefore stated, a written undertaking or agreement to sell the said premises when he could obtain a remunerative price therefor, and to pay to the party receiving such undertaking or agreement the proportion ascribed to him in the said schedule, after deducting his disbursements and just charges, as hereinbefore mentioned.

That afterwards, and in the year 1876, John P. Crosby, one of the parties to the said agreement, died, leaving a will, which was duly admitted to probate by the surrogate of the city and county of New York on or about the 6th day of October, 1876.

That by his said will he left all of his property, real and personal, to his wife, the defendant, Margaret B. Crosby, and that afterwards, and in said month of October, 1876, letters testamentary were duly issued by the said surrogate to the sons of the testator, the defendants, William B. Crosby and Henry Ashton Crosby, the executors appointed in the said will.

That ever since the purchase of the said premises was made
145 by this plaintiff, as hereinbefore mentioned, and up to the present time, this plaintiff has had the sole charge and management of the said premises, and that during all this time he has taken all necessary measures to preserve the premises from adverse occupation and to prevent waste and cutting of timber upon the said premises, and that he has paid all taxes and charges upon the said premises and made all other necessary disbursements incidental to the care and management of the premises; that during the said time he has instituted legal proceedings and collected adverse claims of title to the said premises, and upon application to the proper courts has obtained a reduction of the taxes imposed upon the said premises.

And this plaintiff further says that in the month of March, 1878, he called a meeting of the parties interested in the said premises and presented to them an account of his disbursements to that date, with interest, and that the balance due this plaintiff upon the said account, exclusive of any charge for compensation, was $7,307.60, and that since that time he has made further disbursements amounting to the sum of about $225.00.

And this plaintiff further says that he has made efforts to sell the said premises, but that he has not as yet succeeded in effect-
146 ing a sale of the said premises, nor any part thereof.

And this plaintiff further says that the said property has greatly decreased in value and that the amount of his lien upon the

property for disbursements in the care and management of the said property is constantly increasing by reason of the accumulation of the annual taxes and other expenses incidental to the care and management of the said property, and that the parties interested in the said property are numerous and scattered, and that by the death of some of the parties to the agreement hereinbefore set forth the interests have already changed and are liable to be still further changed by death or other causes, and that for all these reasons, and on account of the uncertainty as to the ownership of certain interests and the residence of the owners of the said interests, but by no act or default of his own, this position of this plaintiff in regard to the said property has been materially changed, and that his responsibility and the difficulties of his position have been greatly increased and are liable to be still further increased, and that the disbursements already made in the care and management of the said premises are already far greater than was contemplated by the parties to the agreements hereinbefore set forth at the time the said
147 agreement were made, and that this plaintiff is no longer willing to devote any further time nor to continue making disbursements for the common benefit of all the parties interested in the said property; and that at the meeting held in March, 1878, the plaintiff, as appears by the minutes of the said meeting, a copy of which is hereto annexed, marked "B," submitted the account of his disbursements already made by him, and informed the defendants who were present that he was unwilling any longer to act as disbursing manager of the said property, but that none of the said defendants offered to relieve him nor to pay anything on account of the moneys already disbursed by him in the care and management of the said property; and that at the said meeting this plaintiff announced his intention of filing a bill at Charleston, West Virginia, to wind up the trust and procure a decree for the sale of the said premises.

And that (inasmuch as none of the defendants are personally liable to this plaintiff) this plaintiff hath no other means of recovering the amount of the disbursements which he has already made and of the other disbursements which it will be necessary to make unless the said premises shall be sold, and to compensate himself for
148 the time and trouble he has expended in the care and management of the said premises, and to recover the compensation for his care and management of the said premises since the purchase of the said premises in the year 1865, which said compensation this plaintiff is entitled to under and by virtue of the agreements hereinbefore mentioned and set out, save only by a sale of the said premises upon which the said charges are a just and valid lien, and upon which it was stipulated and agreed in the agreements hereinbefore mentioned that the said charges should constitute and be a prior lien, to be paid out of the first moneys arising from a sale of the said premises.

Wherefore this plaintiff prays that the trusts arising out of the said agreements may be administered and carried out by and under the directions of this court, and that an account may be taken of all

sums of money expended by the plaintiff in the care and management of the said premises and of all sums received by this plaintiff issuing out of the said premises, and that upon taking said account interest be allowed or charged upon the several items at the rate of 7% per annum, the legal rate of interest in the State of New York,
149 of which State this plaintiff is a resident, and wherein all the contracts and agreements hereinbefore mentioned were made, and where the said disbursements were made, and that a reasonable allowance may be made to this plaintiff for his services in the care and management of the said property since the year 1865, and that a decree be made that the said premises be sold, by and under the direction of this court, and that this plaintiff and all others beneficially interested in the said property may be at liberty to bid or purchase at the said sale, and that the moneys arising from the said sale be brought into court, and that this plaintiff be paid the amount of the balance found due and owing to him upon taking the account hereinbefore prayed for to ascertain the amount due the plaintiff for disbursements and his compensation hereinbefore mentioned, together with the costs and expenses of this suit, and that the remainder, if any, of the said money arising from the said sale be divided among all the parties interested in the said property according to their respective interests in the same, as hereinbefore set forth, and that the plaintiff may have such other and further relief in the premises as the court shall see fit to grant.

1st Amended Bill.

HENRY A. CRAM, Compl't,

150 *vs.*

EDWARD A. BIBBY & All Other Parties Named in the Original Bill Filed in This Cause, Def'ts.

Amended bill.

By way of amendment to said original bill comp't says that all the parties named [as] def'ts in his orrginal bill are now residents of the State of West Virginia, & he asks that they be made parties def'ts to this amended bill, & that the Winifred Mining & Manufacturing Company, which was incorporated by the laws of West Virginia, & did business in Kanawha county, W. Virginia, be also made a like def't to these bills & answer same; that the court, by proper attachments, will subject to sale the interests of said several defendants in said lands to satisfy *to* compl't — his demands against the same, as set out in his original bill filed in this cause, & will direct all proper accounts between the parties to this cause, & will grant unto your orator all such further & general relief to which he is entitled.

H. A. CRAM, *By Counsel.*

T. B. SWANN, *Sol.*

2d Amended Bill.

HENRY A. CRAM, Compl't,

vs.

151 EDWARD A. BIBBY *al.*, Def'ts Named in Comp't's Original & 1st Amended Bill Filed in This Cause, & the Winefrede Mining & Manufacturing Company, a Company Incorporated by the Laws of West Virginia & Doing Business in Kanawha County, W. Virginia.

By way of further amendment to his original & 1st amended bill comp't says that at the sale made of the 10,180 acres of land under decree of Kanawha circuit court, executed by Com'r T. B. Swann, who, as such, made the deed for s'd lands to comp't (see copy herewith filed as part of this amended bill), the railroad track & road-bed leading from the Kanawha river to this 10,180 acres of land, some 5 miles, more or less, was sold & should have been conveyed by Com. Swann in s'd deed to comp't, but by mistake it was left out & not embraced in said deed. Comp't asks that the Winifrede Mining & Manufacturing Company & all parties named as def'ts in the original bill be made def'ts to & answer this bill; that the court will treat the roadway as a part of this property & as embraced in s'd deed to comp't. This is a coal property; the road & road-bed & rail cost some $300,000, & the property is valuless
152 without this roadway; thus the court will sell the property, including the road-bed, as an entirety, & will grant general relief.

H. A. CRAM, *By Counsel.*

T. B. SWANN.

(Deed of June 25, 1870, filed as exhibit with 2d amended bill found on page 115 of this record.)

Answer of Winifrede Mining & Manufacturing Company.

(Case of CRAM *vs.* BIBBY & Others.)

"The answer of the Winifrede Mining & Manufacturing Company to comp't's bill & 1 & 2 amended bills filed against this def't, and for answer to said several bills this def't says that the allegations contained in said several bills, & especially in the s'd 2nd amended bill filed by H. A. Cram, are true; that the property, including the road-bed & 10,180 acres of land & the rails, was sold as an entirety, and as such purchased by Henry A. Cram, & the deed from Com. Swann should have granted to compl't the roadway as well as the 10,180 acres of land. After the deed from Com'r Swann to comp't the court appointed com'rs to sell & remove the iron from the road-bed for the use of comp't, & the iron was removed & sold by said com'rs for use of comp't, & the proceeds
153 applied by the court to the purchase-money due from comp't, & this sale of iron was confirmed by order of the court.

THE WINIFREDE MINING & MANUFACTURING COMPANY,

T. B. SWANN, *Sol.* *By Counsel.*

(Decrees referred to in foregoing answer as Exhibit "5" are Exhibit 1 on page 17 and Exhibit 2 on page 23, respectively, of this record.)

154 And at another day, to wit, at chambers, at Parkersburg, West Virginia, March 11, 1882—

Notice for hearing of this cause at chambers, at Parkersburg, West Virginia, at the office of the judge of this court, on Saturday, March 11, 1882, having been given by the plaintiff to the defendants in the manner provided in the order submitting said cause, entered at the fall term of the court for the year 1881, and said notice having been duly served as required in said order of submission, plaintiff, by counsel, appeared at the office aforesaid & at chambers on this 11th day of March, 1882, pursuant to said notice, and moved the court to hear and decide said cause accordingly. Plaintiff, by counsel, also moved the court to file the depositions of William A. Quarrier, John Diddle, Thomas B. Swann, and John H. McConihay, taken in behalf of the plaintiff pursuant to said order of submission; also to file the disclaimer of the following defendants, namely: F. G. McConihay, W. R. McConihay, James D. McConihay, M. J. Shrewsbury, S. L. Goshorn, C. B. Smith, Mary S. Smith, S. L. McConihay, James M. McConihay, John W. McConihay, which disclaimers are in writing and disclaim all right and interest in the land and matters in controversy in the cause; also to file a certain prop-

155 erly attested record of part of the chancery cause of Bank of Virginia *vs.* Winifred Mining & Manufacturing Company *et al.*, to be read as evidence in the cause; all of which motions, being considered by the court, are granted accordingly.

And thereupon this cause came on to be further heard at chambers, at the office of the Honorable John J. Jackson, judge of this court, on this eleventh day of March, 1882, pursuant to the order of submission and notice aforesaid, and was argued by counsel for plaintiff, upon consideration of all which the court is of opinion that by the proceedings in the county court of Kanawha county, West Virginia, upon the petition of John McConihay, then living and now deceased, begun in the year 1853, and prosecuted from time to time in said court and other courts, against the Winifred Mining and Manufacturing Company to ascertain certain damages against said company for certain lands of said McConihay, which said company proposed to condemn, being the same proceedings of which a copy is filed in this cause, marked "Proof F," and the subsequent payment of the damages so ascertained, the Winifred Mining and Manufacturing Company became vested with the fee-simple

156 title to said lands, as the same are described and set out in said proceedings; and the said John McConihay (the petitioner and the grantor of all the defendants in this cause except John H. McConihay, and the ancestor of all the defendants, except the defendants named as "husbands") became divested of all title in the same; that by the sale referred to in the bill made to Henry A. Cram by Thomas B. Swann, special commissioner in the chancery cause of the President and Directors of the Bank of Virginia against the Winifred Mining & Manufacturing Company and others, here-

tofore pending in the circuit court of Kanawha county, West Virginia, the title to said lands so acquired by said Winifred Mining & Manufacturing Company passed to said Henry A. Cram; that by the sale, also stated in the bill made to the plaintiff by Henry S. Cram, Thomas B. Swann, Isaac M. Smith, and Thomas L. Brown, special commissioners in the chancery cause of Henry A. Cram *vs.* E. A. Bibby *et al.*, now pending in this court, the title to said lands so acquired by Henry A. Cram passed to the plaintiff; that the title to these lands has never reverted to or vested in the said John McConihay (petitioner, grantor, and ancestor, as aforesaid) in his lifetime, or in any one claiming under him since his death, by
157 reason of any non-user or abandonment or default or failure of any kind on the part of the said Winifred Mining & Manufacturing Company or of any one claiming under it. It is therefore adjudged, ordered, and decreed that as to all the questions presented in this cause, or arising out of the facts presented therein, the plaintiff's title to the lands aforesaid, acquired as aforesaid, shall, as against the defendants, and as against any and each of them and all parties claiming under them, be forever quieted, settled, and established, and declared firm and valid; that the title of the defendants, and each of them, to the lands aforesaid, as set up and claimed in their answer in this cause, or as might be set up and claimed thereto from facts known to them and existing at this time and not asserted herein, be, and the same is hereby, declared to be of no effect and invalid; that the defendants, and each of them, are hereby perpetually enjoined and restrained from interfering with or hindering or obstructing the plaintiff, his agents or employees, in the use and enjoyment of the lands aforesaid, acquired as aforesaid, and from asserting any claim or right or ownership in any
158 manner to said lands upon any of the grounds or facts or claims set up and asserted by them in their answer in this cause, or upon any grounds or facts or claim known to them and existing at this time which have not been asserted by them herein.

And it is further ordered that the plaintiff recover of the defendants his costs by him in this behalf expended, including the docket fee of twenty dollars, and he may have execution therefor.

It is further ordered that the plaintiff have leave to withdraw from the file of this cause such original papers as he may have filed therein which he wishes to preserve, provided he shall leave in the file copies of said papers certified to be such by the clerk of this court, and this cause is retained for any orders that may hereafter be necessary to enter therein.

March 11, 1882.

J. J. JACKSON, *Judge.*

Teste:

JASPER Y. MOORE, *Clerk.*

(Endorsed:) Entered at Charleston, March 15, 1882.

The disclaimers mentioned in foregoing decree as filed are in the words and figures following, to wit:

We, the undersigned, do disclaim all right or interest in the lands condemned by the late Winifrede Mining and Manu-
159 facturing Co., and do not wish to act as parties to the suit wherein the McConihay heirs are plaintiffs & Theodore Wright defendant.

Given under our hands this 24 January, 1882.

MALINDA F. McCONIHAY.
C. B. SMITH.
MARY S. SMITH.
S. L. McCONIHAY.
JAMES M. McCONIHAY.
JOHN W. McCONIHAY.

We, the undersigned, do disclaim all right or interest in the lands condemned by the late Winifred Mining and Manufacturing Co., and do not wish to act as parties to the suit wherein the McConihay heirs are plaintiff and Theodore Wright, defendant.

Given under our hands this 24th January, 1882.

F. G. McCONIHAY. [SEAL.]
W. R. McCONIHAY. [SEAL.]
JAMES D. McCONIHAY. [SEAL.]
M. I. SHREWSBURY. [SEAL.]
S. L. GOSHORN. [SEAL.]

STATE OF WEST VIRGINIA, }
County of Kanawha, } *ss:*

160 I, J. H. McConiha, a notary in and for the county of Kanawha, do certify that James D. McConihay, Felix G. McConihay, W. R. McConihay, Mary J. Shrewsbury, & S. L. Goshorn, whose names are signed to writing above, bearing date the 24th day of January, 1882, acknowledged the same before me in my said county.

Given under my hand this the 26th day of January, 1882.

J. H. McCONAHA,
Notary in & for Kanawha County.

The depositions referred to in the foregoing order as filed, &c., are in the words and figures following, to wit:

161 W. A. QUARRIER, a witness of lawful age, being by me first duly sworn to speak the truth, the whole truth, and nothing but the truth, answered and deposed as follows, to wit:

By I. N. SMITH:

Question 1. State all that you know about the judgment of John McConihay *vs.* Winifrede Min'g & M'f'g Co.; what connection you had with McConihay's interests in the matter; whether said judgment was ever paid; what the judgment of $2,750.00 was obtained for, and, in general, all you know about the matter.

Answer. The judgment for the land damage was, I think, recovered before I came to the bar. B. H. Smith was the counsel for McConihay, and also for Dickinson & Shrewsbury. Both McConi-

hay and Dickinson & Shrewsbury owned lands on Fields creek, and they rather joined in fighting the Winifrede Company. After I came to the bar—in 1853, I think—B. H. Smith & myself instituted proceedings to recover from the Winifrede Company compen-
162 sation for timber along the line of the road, and recovered judgment for McConihay and for Dickinson & Shrewsbury. In this way I became connected and obtained knowledge of those transactions. Some years subsequent to that George Jeffries, as the agent of parties living in New York, paid off the Dickinson & Shrewsbury judgment and took an assignment of it. I do not recollect to have seen him pay off the McConihay judgment, or do I recollect seeing the assignment of McConihay, but my understanding then was and is now that the McConihay judgments were obtained by Jeffries about the same time & in the same manner as the Dickinson & Shrewsbury judgment. I may add that I was for some time counsel for John McConihay in his business generally, and am satisfied that if those judgments had not been collected I would have known it.

(So much of said answer objected to by defendants' counsel as states witness' former or present understanding, or his opinion as to payment of said judgments.)

2d by same. Look at the paper filed in this cause, marked "Proof D," and the signatures thereto, purporting to be made by you, and state whether those are your signatures, and in what capacity they were made.

163 Answer. These signatures are my proper signatures, and were made by me as the attorney for Dickinson & Shrewsbury, John McConihay, and Ruffun, Donnally & Co. I suppose I signed my name as agent and not as attorney, for the reason at the date of the paper I was not allowed by law to practise law, not being able to take the test oath then in force.

X-examined by J. F. Brown:

1st Question. Have you any present recollection of the signing of said paper or of the transaction referred to in said paper?

Answer. No; I have no present recollection of signing that paper, and am only refreshed by seeing my signature.

And further deponent saith not.

WM. A. QUARRIER.

John A. Diddle, being duly sworn, deposes & says:

1st Question. Where do you live, how long have you lived there, and in whose employ?

Answer. I live on Fields creek, Kanawha county, W. Va., and have lived there since 1853. I have been in the employment of the Winifred Company.

164 2d Question. In whose employ have you been since the sale of the Winifrede property to Henry A. Cram? What duties have you performed?

Answer. I have been there under Cram, and have been looking over and in charge of the property.

3d Question. Who attended to renting the property, protecting the timber? Who has had possession of the right of way & depot on the bottom lands taken by the Winifrede Co. from McConihay? In what way was the possession maintained?

Answer. I did. I have had possession from 1865 on up to 1874. In 1876 Col. T. B. Swann took charge of it. In 1874 and 1875 I leased it. I took charge of the property in 1865 and leased it after Mr. J. M. Kelley went West to his son-in-law, Robert H. Keeney, for five years. I also, after the five years were out, rented it to said Keeney, and now file as J. H. D. No. 1 & No. 2 rent bonds for 1874 & 1875.

4th by same. What connection did J. M. Kelley have with the way & depot before he went West? Who lived on the property during the time that you leased to Robert H. Keeney? Who has
165 lived on said property since Robert H. Keeney, & from whom did such person lease the property? State whether the way & depot have been left open as a part of the McConihay field, or whether they have been fenced off, so as to separate the Cram property fom the McConihay property.

Answer. He managed the business there, and of course had possession of the way, and was attending to the coal there and the depot. There was no other person living there but Rob't H. Keeney. A man named Gallagher lived there after Keeney left, & he rented from Col. Swann. The depot & way have been fenced off, so as to separate it from the McConiha property, except probably a half acre, which, if the fence had been straightened, would be also fenced off from McConihay. Old John McConihay promised to finish the fence, so as to fence off to the company this half acre also, but never did it.

5th by same. Who lived on this river property after Gallagher up to the present time, & from whom was it leased?

Answer. Pat Fry lived there after Gallagher; then Dick Miles, and then Asa Carr, who lived there up to the present sime. They leased from T. B. Swann.

166 6th by same. Have you had any talk with any of the McConihays about the fencing of this way & depot? If so, state all about it.

Answer. Not lately; we went once with a tape-line to measure. They wanted to have the fence reset from the fact that it set out too far in some places & not enough in others. They called on Mr. Cram to assist in making his part of the fence. Mr. Cram offered them the timber to fix their fence if they would repair his part, and then finding it would cost $200 said he wouldn't do that, but would fix up or repair the fence for present as it was.

7th by same. Which of the McConihays was it with whom this conversation took place? What fence did he want Mr. Cram to make his part of?

Answer. James McConihay had the conversation referred to. The fence was one of the line fences going towards the river. He wanted Mr. Cram to fix one-half of it. It was the fence between the Win-

ifred- Company and the McConihays—one on each side of the road. This conversation took place in 1877.

8th by same. What claim to the right of way & depot did
167 James McConihay make at that time?

Answer. He made no claim at all; didn't pretend to claim any.

9th. Was the house built by Kenney built on the Winifrede property?

[Answer.] Yes, sir.

10th by same. How long did the Winifred Company or its officers operate the railroad & use the depot and way obtained from McConihay?

Answer. They run it & used it from 1853 to 1865 for coaling, and it was then leased and rented, as I have before stated.

11th by same. Have any of the McConihays at any time to your knowledge claimed as their own or their father's the way and depot aforesaid, and did John McConihay in his life-time claim the same since its condemnation by the Winifrede Company?

Answer. No, sir; except that the old man in his dotage claimed that he owned all that property, but, of course, he did not
168 know what he was talking about then; the trains on the Chesapeake & Ohio Railroad used to have to stop and get him off the track in his old age, as he claimed they had no right to run there, as it was his land.

Cross-examined by J. F. BROWN:

1st Quest. Whereabouts on Fields creek do you live & have you lived during the period stated in your former answer?

Answer. Four miles up the creek on the 10,000-acre tract at the storehouse or office.

2d by same. State when & where you were employed by Cram, and if by written contract please file it.

Answer. After the sale, I think in 1865, I was employed at my home by Mr. Cram; Col. T. B. Swann was present, and I was to report to him if anything got wrong; we had no written contract.

3d by same. State the exact terms of your employment.

Answer. I was to go & take care of the property & lease out property, fence up & clear out and make my living.

4th by same. Do you mean the property that Cram purchased at judicial sale?

169 Answer. Yes, sir; the Winifrede property.

5th by same. You speak of a depot; what depot do you mean? State if there is any depot upon the property in controversy in this suit.

Answer. Well, we called it a depot; it was the termination of the track where they dumped their coal; there was an office there; there is no depot but that on the property in controversy in this suit.

6th by same. Is there *is* any coal dump office or shed on said property at this time, or has there been since the purchase by Cram?

Answer. No; not now; the bank gave way & some of it washed

off; there is nothing left there now; it went away or was taken away finally in 1868 or 1869.

7. State when the Winifred- railroad track was removed and ceased to be used for railroad purposes?

Answer. The track, rails, &c., was all taken away in 1866; the ties remained; the iron track was lifted off; the ties rotted or were carried away for fire-wood.

170 8. For what purpose has said land been used since that time?

[Answer.] I think part of it has been used for pasture [and] for garden purposes, corn, &c.

9. State the exact date of the first tenant going on the place put there by you under Cram?

Answer. I think it was in 1869; he stayed there five years under that lease, and then he remained two years under rent contracts, which I filed.

10. Were you present at the leasings to Gallagher, Fry, & Mills, respectively; do you speak of your own knowledge or from hearsay in reference to these leases?

Answer. Only hearsay.

11th. Was the tenement house at any time vacant?

Answer. Not that I know of; not an hour.

12. Has not a portion of the land in controversy been in possession of the McConihays and been in cultivation by them for the last ten or fifteen years?

171 Answer. Nothing but the corner of half an acre spoken of by me; that is all.

13. Were you present at the conversation stated by you as between James McConihay & Mr. Cram in reference to repairing the fence?

Answer. I was, sir.

14. State exactly where it occurred and the exact date.

Answer. It occurred right at the bars of the fence at the Chesapeake & Ohio railroad, where the land is cut off next to the river. It was, as near as I recollect, September 14, 1877.

15th. Were there any written leases taken by you from any tenants other than those filed with your deposition? If so, please produce them.

Answer. There was one only, & that was to Keeney, mentioned by me; I think it impossible to produce [it], because I believe I gave it up to Keeney when he fulfilled it. I generally gave them up when they were fulfilled.

Exception. All testimony in relation to the Keeney lease objected to because in writing & not produced.

172 16. Did you lease to any parties other than those you have mentioned or in any other way than as mentioned any of the land in controversy?

Answer. No, sir; there was nothing else to lease but this one small house on the river side of the Chesapeake & Ohio road; I made no verbal leases to any of the land in controversy.

17. State whether or not you know the acreage of the land commonly known as the 10,000 acres purchased of O'Connor & others by the Winifrede Company before the condemnation of the McConihay land.

Answer. I do not; they are running the lines now, with two surveys to test it; one surveyor makes it 10,180 and the other 12,747.

Redirect examination:

1st Quest. Is the James McConihay of whom you spoke the James D. McConihay the trustee in the deed made by John McConihay for his children?

Answer. It is James McConihay, the trustee; I don't know about his middle name.

173 2d. Please explain what land is fenced in, as you have above stated, on the river side of the Ches: & Ohio R. R.; whether it is fenced on both sides or not, and whether separated by the fences from the McConihay land; how long those fences have been maintain there.

Ans. It is fenced on both sides; it was aimed to be kept closed and is kept separate; these fences have been maintained there ever since the commencement of the Winifred railroad.

3d. Without saying anything about what were the contents of your first lease to R. H. Keeney state what ground he took possession of & occupied under that lease, who occupied the house, & whether he used or cultivated all the land under fence of the Cram property on the river side of the C. & O. R. R.

Answer. He took all the ground from the Chesapeake & Ohio railroad out to the river with the McConihay line. Keeney occupied the said house and cultivated or pastured all of the said land between the railroad & river belonging to the Winifrede Company.

Exception. (Question & answer objected to because it is im-
174 material what possession was taken outside of the lease, & because the lease itself is the only proper evidence of its contents.)

Q. In your answer to cross-examination 16th question you say: "There was nothing else to lease but this one small house." In making this statement did you mean to say that the lease was for this house and nothing else?

Answer. I meant this house and the bit of land that was attached to it.

Question objected to because the lease itself is the only proper evidence of its contents.

4. Explain what you mean by "the bit of land?"

Answer. I mean the bit of land belonging to Winifrede lying there next to the river.

A. Do you mean part of the Winifrede land on the river side of the C. & O. R. R., or all of the land there situated?

Ans. All of the land of Winifrede that was under fence there

175 Recross-examination by J. F. B.:

1st by J. F. Brown. Do you mean to say in your answer to 2d question on your redirect examination that all the land in controversy in this suit was within the fences that you have mentioned, and are you willing to state on oath that all or any of them are upon the line of the condemnation made by Winifrede Company?

Answer. All but that corner that I have spoken of, which has never been straightened out; the fences may be a little off the line, but they have not been straightened. I am willing to state on my oath that the fences are on the line of condemnation by Winifred-Company, as I understand them to be and so far as I know. I saw old man McConihay running a part of his fence, and heard him say he was running it right on the line.

2d Question. Do you not know that but very little of the fences are upon the line of said condemnation by Winnifred-?

Answer. No, sir; I don't; for, as I say, some of them may be a little ever one way or the other, crossing gullies, &c.; they can't be straightened.

176 3rd by same. Do you not know that the fence along the river portion of the land in controversy is at least ten (10) feet off said condemnation line the whole length up and down the river?

Answer. No, sir; because McConihay told me a portion of it was on the line, and I know some of it near the house was put there according to the corner.

4th. Were you present when the commissioners ran the condemnation line, or have you seen a plat or the calls of said condemnation, if so, when and where?

Answer. No, sir; I wasn't present. I probably have seen such plat or calls, but don't recollect the place or time. They were in the office probably when I saw them.

5th by same. Do you mean to say that you know where the said calls of said condemnation line run upon the ground. And, if so, state what those calls are.

Answer. I have been with the surveyors when they were running it off. I know where the corners are, or close to where they

177 are. I know the commencement is 160 feet wide; then it drops off to 80 feet; then 60 feet goes all the way up.

6th by same. Do you make this statement from an inspection of the condemnation papers or from hearsay?

Answer. From being with the surveyor when running the lines & taking the tape-lines and measuring them. It would be from hearsay with me. The surveyor called for that amount.

7th Question. Did you see the papers from which the surveyor was running? And, if so, state what papers they were.

Answer. I saw papers in his hands, but did not see the face of them or what they contained.

8th [Question]. In answer to your 3rd question, on redirect examination, you say Keeney took possession of all the ground between the C. & O. railroad and the river, with the McConihay line. Are you not mistaken in that answer?

Answer. No, sir; not the way the fences stood. He did not take possession of that corner which I have mentioned as never having been straightened.

178 9th by same. Did he take possession of anything outside of the fences?

Answer. He wouldn't have any right to.

And further deponent saith not.

JOHN A. DIDDLE.

(Defendants object to so much of the foregoing deposition as seeks to relate transactions or conversations with John McConihay, because not evidence against these defendants.)

T. B. SWANN, being duly sworn, deposes & says:

1st Quest. State your connection with the matters involved in the chancery causes of B'k of Virginia *vs.* Winifrede Min'g & M'f'g Co. & of Cram *vs.* Bibby *et al.* and with Mr. H. S. Cram. State what you know about the matters involved in this cause.

Answer. I brought that suit of The Bank of Virginia *vs.* Winnifrede Mining & Manufacturing Co. & Others, and got a decree in it, I think, in [the] early part of 1861 for a sale of the property. I was appointed sale com'r to sell the property, and as such did sell it, and Henry A. Cram became the purchaser, and, after paying the
179 purchase-money, got a deed for it about 1872, I think, possibly a year or two earlier. Mr. Cram purchased it for himself, N. Dane Ellingwood, & others. As com'r of the court in the case of Bank of Virginia *vs.* Winnifrede Co. & others, I collected all the purchase-money and disbursed it according to the rights of the parties to the cause and the terms of the decrees. I remember especially paying to John McConihay all that was coming to him in that case. I remember that especially, because he was more urgent for it than anybody else, except George Jeffries. Receipts were taken for all the monies paid out by me in that case and returned to court with my reports, and I think after paying all the money decreed to be paid there was a balance of something over $100 left, after disbursing over $100,000; as well as I now remember and upon somebody's suggestion, connected with the cause, there was an order dividing that balance between myself and Mr. Fitzhugh, another attorney employed by some of the parties in that cause. I think there was a general order recognizing the distribution without going into details. I was counsel for the Winifrede Company for many years prior to 1861, and afterwards for Mr. Cram and those associated with him
180 after they purchased the property. After Mr. Cram purchased the property I was instructed to clear it of squatters and have it in readiness for sale. I did so. I found John McConihay using a piece of the land of the Winnifred Co., near the Kanawha river and above a fence which ran down to the river just above the railroad. I called Mr. McConihay's attention to it several times by letter, and I think once when he, Mr. Jeffries, & I were together on the property. It seems to me this was about the year 1868 that the interview with him was. My strong impression is that it was in [illegible] 1868

My strong impression is that Mr. McConihay told me the fence remained then where it did at the time of the condemnation and had never been removed to the line, & that the lands of Winnifrede Company ran a few feet above the fence, & that it was expensive removing the fence, & that it had not been convenient for him to do it and the company had not offered to help pay for its removal. He said, moreover, while the company was not running, he would like for the fence to stay where it was and let him use the land above the fence adjoining his meadow. But he said that when he was required to move the fence he would remove it to the line between him & the company. Either then or shortly after that conversation
181 I took from Mr McConihay a paper signed by himself, dated September 7, 1868, which I now show you & will file a copy of. Afterwards there was a good deal of trouble between Mr. Diddle, the agent, and Mr. McConihay, as I understood, about their relative obligations to each other in connection with these lands. Mr. Diddle came down to see me, and I sent some notice to Mr. McConihay, and afterwards I got a letter by mail, I think, which, together with its envelope, I now file. I sent word to Mr. McConihay to come down, or wrote to him. He did come down to Charleston. I prepared a formal paper setting out in substance the manner in which he held this property, as I have detailed it above, and I moreover put in the paper that the statute of limitations should not run against Mr. Cram by reason of McConihay's holding this property above the fence. Mr. McConihay signed this last paper. I frequently saw it in my office. Afterwards, about three months ago, or less, I. N. Smith came into my office inquiring about these matters. I related these matters to him, and told him of these papers; went to a case where all these papers should have been to get them to show Mr. Smith; we found the papers that I have just put
182 into evidence, but couldn't find the paper last referred to. After diligent search in the place, and in the only place I know of in my office where they ought to be, I became satisfied they were lost to me at least. I frequently showed it to persons who had a right to see it, and in the handling it may have become misplaced. I can't find it. The bickering continued between Mr. Diddle & Mr. John McConihay, and I told Mr. McConihay he had to move his fence to the line. He said he would do it if Mr. Cram would pay half the expense of the removal, but suggested that a surveyor had better be sent there to locate the true line. I sent Mr. Mathews there for that purpose. He brought me back a plat of his work. I wrote to Mr. Cram what had been done; he sent me $20, his part of the removal of the fence. I told Mr. McConihay of it; he plead that he couldn't spare the money to pay for his part of the removal, and said there was no necessity for it, and begged — day and put the blame of the trouble upon Diddle; said he would move it when necessary. I kept Mr. Cram's $20 for a long time in my office in my safe, and some two or three years ago
183 I paid it back to Mr. Cram, saying I couldn't get McConihay to pay his part. I think about four or five years ago I wrote to Mr. Cram or his agent, Mr. Davenport, while Mr. Cram was in

Europe, that Mr. McConihay wouldn't do anything towards removing the fence, and that he had better sue him and put him off. He didn't instruct me to do so, and I never did. I brought the suit of H. A. Cram *vs.* Bibby & *als.*, now pending in *in* the United States district court. His son, H. S. Cram, came on here and consulted me about bringing the suit, the form of the bill, the necessary parties, and the court in which it had best be brought. He returned to New York and sent me a bill prepared, together with a copy of the same. I filed that bill, as counsel for Henry A. Cram, together with two amended bills. Subsequently I advised the removal of this last suit to the United States court, and it was removed in the name of Oakley & the Winnifrede Company into the United States court. Mr. Cram wrote to me to use Mr. Oakley's name in removing the suit, stating that he was a citizen of New Jersey. The Winnifrede Company was incorporated by Virginia. I was Mr. Cram's sole counsel, & managed the case to a final decree.

184 (Def'ts object to the reading in evidence the letter filed as Exhibit "J. B. S. No. 2," because not shown to have been written or authorized by said John McConihay, and further object to so much of said depositions as relate to the transactions and conversations with John McConihay, because not evidence against these defendants. They further object to all statements in relation to contents of the paper stated to have been signed by McConihay and not produced; also to all matters purporting to be of record or in writing, because said record or writing themselves are the only proper evidence.)

2nd Ques. What is the relation between the John McConihay of whom you have spoken and the parties defendants to this cause? Is he the same as the grantor in the deed, Exhibit No. 4, with the bill? Is he [the] same who was party to the suit B'k of Va. *vs.* Winifrede Co.?

Answer. John McConihay is the father of J. D. McConihay, W. R. McConihay, Mrs. Cabell, and other children. He was a party to the bill in the suit of the Bank of Virginia *vs.* Winnifrede M. & M. Co. & others.

185 3rd Ques. Who had charge of the lands in controversy from time of the sale to this time? Who has had possession of the same in that period?

Answer. Mr. Diddle was in immediate charge and possession. I had a general charge of their law business and the land business, and agreed with Mr. Diddle as to the terms upon which he should stay there. Mr. Diddle rented out the land for a good many years this side—the river side—of the fence. I rented it out for four or five years prior to this year to different parties. Before that there was a son-in-law of Kelly who was on the place. I think his name was Keeney. Keeney's father-in-law, Mr. Kelley, had been an old servant of the company, and remained on the property for many years with Mr. Diddle. I don't know the spot where Keeney lived, but he remained there and, with Diddle, had supervision of the land. I don't know that Kelley lived immediately on the land, but he and

Diddle for a time had joint supervision of the land. Kelley moved west some 8 or 10 years ago, any my impression is he asked me to favor his son-in-law and to let him remain on the land near the river.

186 4th Ques. You have said you were the commissioner who sold the Winifrede lands. Were the lands in controversy included in the sale you made? Has the purchaser, Cram, claimed the lands in controversy since the sale? Has John McConihay or any of the parties defendants to this cause claimed the lands in controversy?

Answer. They were intended to be so included; same question afterwards arose as to whether they were technically included in the terms of the decree. It was supposed that this land formed a part of the 10,000 acres. It was intended to sell and convey all the lands belonging to the Winifrede Co. at that time. Cram has claimed, and I, as his agent, have claimed the lands for him. John McConihay all the time admitted that it was Mr. Cram's land.

Def'ts except to so much of said answer as relates as to what was intended to be sold, as the record can alone disclose the intention of the court and is the best and only competent evidence, and because said answer seeks to contradict said record; and also objects to the statement of claims made by Cram and the claimed admissions of John McConihay because the former are not competent legal

187 evidence and because the words of said McConihay are not given, said answer being conclusions and deductions drawn by witness.

5 Ques. by same. Please state as near as you can the words of the 3rd paper which you say has been misplaced; and if you cannot state the words, state as nearly as possible the substance of that paper.

Ans. The substance of it was that the land between the fence and the line of condemnation, as defined by Mathews, was Mr. Cram's, as admitted by McConihay, and that whenever it became necessary for Mr. Cram and his associates McConihay would move the fence to the line of condemnation, and would not plead the statute of limitation if he was allowed to hold it. McConihay had already been using it for many years. He wanted the privilege of using it longer and until the company should need it.

Def'ts object to question & answer because it relates to papers which are not produced & which themselves are the best evidence.

188 6th by same. You speak of the fence being over the line, &c. What fence do you mean? Please state whether the land in controversy has been under fence separating it from the McConihay land, and for how long.

Answer. There is a fence running through the condemned land dividing it. McConihay has been using that part above the fence as stated, and that part below the fence has been used as stated. There is no fence upon the line of condemnation. McConihay has a large open field coming up to the line of condemnation & extending to the upper fence; he generally kept it in meadow.

(Continuation of T. B. SWANN's testimony Dec'r 14, 1881.)

1st Question by I. N. Smith. You spoke of bickerings between Diddle & McConihay; please explain what you mean.

Answer. Well, Mr. Diddle represented that on a piece of land claimed by McConihay adjoining the lands of Winnifrede, up Fields creek, and not at all within the lines of the condemned land, McConihay was encroaching upon the lands of Winnifrede and wanted one of Diddle's tenants to pay rent to him (McConihay) for
189 that piece of land. Diddle seemed to be very much worried about it. It seems that both were Baptists.

Cross-examined by J. F. BROWN:

1st Quest. State when the said right of way through the McConihay land was finally abandoned for purposes of said railroad.

Answer. I don't know that it was ever abandoned; don't think it was used much for hauling coal on it since the war. We stripped the iron from it under a decree of court some time in or about September, 1868. I reckon in the case of the Bank of Virginia against Winnifred Co. & others, and the iron was sent down the river & sold, and the proceeds, were applied to Mr. Cram's purchase, as the decrees of court will show. We sold the locomotive about 1872 or 1873, I think, to an agent of the C. & O. R. R.; this locomotive had been kept in an engine-house near the Kanawha river, near where the railroad up to the mines came to the river, and between the fence we have been speaking of and the railroad.

2d by same. ——.

[Answer.] I think it was at Mr. Cram's request that George Jeffries, N. Fitzhugh, Henry A. Cram, & myself were appointed commissioners to strip and sell said iron & apply the proceeds to Mr. Cram's purchase of Winnifrede property.

Question No. 2½. State whether said right of way has been
190 used for railroad purposes since 1872; and, if not, to what use has it been put.

Answer. It was used for railway purposes until the iron was taken off in 1868; since then the property has not been used at all, except as above stated; there may have been a few cultivated fields lapping over on the railroad-bed which were used for cultivation. A man man named Martin, I think, took violent possession of the railroad-bed or a part of it, and I instituted proceedings against him in court for unlawful detainer. I think he came in, confessed, paid costs, & abandoned the property. I instructed Mr. Diddle to be very particular not to allow anybody to trespass upon that road-bed; and, if so, to notify me.

(So much of this answer objected to as states the matters which should properly appear of record, and to so much as relates to instructions to Diddle.)

3d by same. Has said Winnifrede Company or any one claiming to be a successor or grantee, immediate or remote, operated a
191 railroad on any part of the route of said Co.'s road since 1872,

or provided any conveyances or accommodations for the public over said way or any part of said route since that day?

Answer. I think not since 1868; the road-bed has remained except where it washed away, and several little cultivated fields may have run into it. A part of the road-bed up the creek has been used by people in travelling as on an ordinary road; it was a better road than the public road and less washed by the creek.

4th by same. Please state when the Winnifrede Company was wound up.

[Answer.] Its property was sold in the suit of the Bank of Virginia, or intended to be, including the road-way down the creek. I have brought several suits for it since, one pending now, and I remain as counsel to-day in any litigation it may have. The object of the suit Mr. N. Dane Ellingwood employed me to bring, the suit of the Bank of Va. against the Company — I think at that time the claim did not belong to the Bank of Virginia; the records of that suit will show; but my recollection is that the bank's claim
192 and the Dickinson & Shrewsbury and McConihay claim in the condemnation proceedings had all been assigned to Mr. Harriots in trust for himself and some other stockholders in the Winnifred Company. The object of the suit was to sell the property & get it into fewer hands among the stockholders, which was done, with exception of Mr. Cram, I understood. Mr. Ellingwood, in employing me to bring this suit, represented himself and those whom he represented, as the *de facto* Winnifred Company. The object of that suit was to sell everything they had. I drew my inspiration from Mr. Ellingwood, a gentleman whom I knew well, both here & in New York, a member of the New York bar, and I don't know & didn't know much, if anything, about the "interior" of this company except what he told me. My instructions from Mr. Ellingwood, frequently repeated & still unrevoked, were to represent the Winnifrede Company and his own interests therewith connected wherever it was proper. The object of the said suit of the Bank of Va. against Winnifrede Company was to have everything belonging to the company, of lands and improvements therewith connected, transferred to the purchaser in said suit, and until that
193 act was perfect my authority under my engagement with Mr. Ellingwood to represent the Winnefrede Company continued.

So much of the answer objected to as refers to the object of suit & matters pertaining thereto which should be proper matters of record; & to all matters contained in said answer not strictly responsive to the question, and to all conversation recited as occurring between witness and Ellingwood.

6. What proportion of the stockholders of Winnifrede were interested with Cram in the purchase?

Answer. I can't know further than the papers in the suit of Cram *vs.* Bibby show; only a fraction. There were a legion of the stockholders. I think they were all represented in the suit (by counsel) of the Bank of Virginia.

7. Was N. Dane Ellingwood one of those interested in the purchase by Cram?

Answer. I so understand it. He paid my fee in that case, and also T. L. Brown's. I drew on him & he paid it, & I divided it with said Brown.

194 8. When was the last directors' meeting that you know of?

Answer. I can't tell you anything about it, for I never knew anything about their meetings.

9th. Has said corporation any organized existence—board of directors, president, or other officers—since 1870? If so, please state names of such officers.

Answer. I can't tell you outside of the act of incorporation; never knew anything about their meetings, but think they were held in New York whenever held. If there have been any meetings since 1870, I have not been advised of it. Mr. Ellingwood was introduced to me by Mr. George Jeffries, the managing agent of the company, who brought him into my office, and Mr. Ellingwood was the Winnifrede Company to me. Outside of his instructions I know nothing of the Winnifrede Company. If there has been any president or board of directors since 1870, I don't know of it.

10th by same. Please state when Mr. Ellingwood died.

Answer. I think he is still living in New York, on Staten Island.

195 11th by same. State when you last saw him or received a letter from him.

Answer. Haven't received a letter from him for many years; I last saw him at his house in New York city, before 1870.

12th. When did you last communicate with him?

Answer. It has been several years.

Redirect:

1st. State how far your possession and control and care of the railroad-bed and way has extended to that part of it which lies on Fields creek, south of the Chesapeake & Ohio railway?

Answer. Mr. Diddle, under me, had general & actual possession of the whole property, and of the road-bed, as much as of the residue of the tract.

Recross-examination:

Please state what actual possession of the road-bed, acquired from McConihay by the condemnation & lying south of the railroad, Mr. Diddle had as agent for Cram.

196 Answer. I don't believe I could state further than as I have already stated. He reported to me when there were any trespasses, and means were taken to abate them.

2nd. Were the trespasses you refer to, any of them, on the part of the land mentioned in the preceding question that you recollect of? And, if so, state them.

Answer. They were; I have mentioned the matter of Martin as a

trespasser reported by Diddle to me on the road-bed, and what means we took to remove him ; I don't remember any other now.

And further deponent saith not.

T. B. SWANN.

John McConihay's Deposition, Taken this 7th of January, 1882.

JOHN MCCONIHAY, being duly sworn, deposes & says:

1st question by I. N. Smith. Please state your age, residence, & occupation.

Answer. I am 44 years old ; reside in Kanawha county, W. Va., and [am] a lumber dealer.

197 2d by same. State, if you know, what land was condemned by the Winnifrede Company as part of your father's property and whether your father was paid for the same.

Answer. Well, the land on Fields creek, called McBride survey, running from and beginning at James river and Kanawha turnpike road up the creek about 3 miles. I don't now recollect the number of feet condemned by Winifrede Company, but I think it was 60 feet. That is all comprised in the McBride survey, I think. Then, commencing at James river and Kanawha turnpike, running diagonally across the bottom in the Harman tract about 400, or it may be 500 yards, taking the same amount of land as in the McBride survey, which, I think, is 60 feet. From the coal-tipple of their works down towards the cut in this tract, some 300 yards, the space of 130 feet was taken. This comprised most of the river bank down to low-water edge and a right smart little space on top of the bank, this being fenced off by the Winifrede Company soon after the condemnation, and I think has been held by them up to the present time, with a tenant on the place. There was another

198 and a subsequent contract, the terms of which I don't know, or what consideration was in it, by which from the tipple up to the bar the company made a wagon road. I don't know whether the contract was ever carried out or not, but think it was ; no possession was ever given. He, my father, was paid for the property condemned, but I am not positive now as to the number of feet condemned, but I think it was 120 feet in one instance & 60 in the other.

3d by same. State in what way you know the fact that your father was paid for the condemned property.

[Answer.] From the fact that he gave them possession of the part condemned and heard him repeatedly say that he had been paid the amount, $3,500.00, which, I think, was what the court allowed him.

4 by same. Were you ever present when any of said money was paid?

Answer. I came down here once with one of their checks for some of the money and got it. I remember the circumstance so well because he had failed to endorse the check and I had to return with it.

5th by same. Do you know of your father's ever claiming
199 to own this condemned property after it was so condemned and the money was so paid?

Answer. Don't think that he can set up any claim to it, from the fact that it was fenced off and the fence was always maintained.

6th by same: You have spoken of the (Middleton) Harmon tract. Is that the land lying between said turnpike and the river?

Answer. It is.

Cross-examined by J. F. BROWN:

1st by J. F. B. Where do you now reside, & how long have you resided there, and how long since you ceased to reside with your father?

Answer. I reside at St. Albans, Kanawha county, W. Va., and have lived there 10 y'rs last March; I left home in 1860, and resided at Red House, Putnam county, W. Va., until the war of 1861; I resided at Brownstown from 1865 to 1871. I was in the war some years next preceding 1865. In 1858 & 1859 I stayed at home with my father and attended to his business, collecting rents, &c. From 1865 to 1871, while I lived in Brownstown, I also attended to my father's business, such as renting out his property and collecting rents,

200 2nd by same. Were you at your father's home frequently after 1871?

A. No, sir; not more than as I would go home to see my father two or three times a year.

3 Question. Did you have any communication with your father in regard to this land after you went to St. Albans, or in reference to his claiming or not claiming it?

Answer. No, sir.

4 by same. Are you not mistaken in saying the lands condemned of your father were fenced; were not the lands so condemned above the turnpike wholly unfenced, and was not a considerable portion of the land so condemned on the north of the turnpike outside the the fence?

Answer. I only have reference *only* to the Harmon tract in speaking of its being fenced. As to the McBride tract, which was condemned, the road ran along the creek a good deal, & the wagon road up the creek crossed the tract in a number of places. The only portion that was outside of the fence on the north side of the
201 turnpike was at the tipple at the river.

5th. Did your father claim all the land outside the fence as his own?

Answer. I think so.

6th. When was it & where that your father told you he had been paid for the land condemned?

Answer. Don't recollect the time & place, but have — him speak of it frequently in business. It was after the condemnation, & while the company was at work; it was before 1860.

7th by same. Do you mean that he said he had received the money, or had a judgment for it?

Answer. That he "had got his money from the Winnifrede" was his expression. I heard him say it 50 times.

8th by same. Has the Winnifrede, or any one claiming under them, had possession of the condemned lands on south side of the road since they removed the rails in 1868?

Answer. I don't know that they have. There is hardly
202 room enough to build a house on it, & I don't think any house has been built on it, and don't think there has been any claimant on the McBride survey of the condemned land.

9th by same. State when it was that you presented the check refer-ed to, & by whom drawn.

Answer. I think Mr. Custerman drew the check. It was drawn in the name of the Winnifrede Mining & Manufactoring Co. I don't recollect the amount; it wasn't over $200 or $300, though; don't recollect the date; it was before they commenced shipping coal; while I was yet a boy; I think it was a couple of years after the condemnation—about 1855 somewhere.

10. Please examine the paper purporting to be signed by John McConihay, your father, & filed with deposition of T. B. Swann in this cause, & state in whose handwriting the signature is.

Answer. I have examined it, & it is my father's signature.

And further deponent saith not.

J. H. McCONAHA.

203 Indenture between the Winifrede Mining and Manufacturing Company of Virginia, of the first part, and James J. Ring, of the city of New York, of the second part.

Whereas said company has resolved to borrow three hundred thousand dollars to take up and cancel the bonds heretofore issued by it, and to use in its usual and ordinary business, and to secure the payment thereof has resolved, "that mortgage bonds to the value of three hundred thousand dollars be created in such amounts as the directors may deem most advisable to subserve the interest of the company, to be payable in ten years from date of issue, bearing interest at seven per cent. per annum, payable semi-annually;"

And the directors of said company have resolved that two hundred of said bonds be issued for the sum of one thousand dollars each, one hundred and fifty of said bonds for the sum of five hundred dollars each, and one hundred of said bonds for the sum of two hundred and fifty dollars each:

Now, this indenture witnesseth: That said company, in order to secure the payment of said bonds and interest, and to protect the interests of all its creditors, and in consideration of one dollar to it paid by said party of the second part, the receipt whereof is hereby acknowledged by these presents, doth grant, bargain, sell, transfer, and convey to said party of the second part, and his successors in the trust hereby created, all the real and personal property of
204 said company, or to be acquired by it by whatsoever nature or description, and wheresoever situated, said real property being described as follows, viz: "All those certain ten thousand

acres of land part of that certain tract or parcel of land containing thirteen thousand, five hundred and twenty-five acres (13,525), as now ascertained by survey made by Abel P. Sinnett, surveyor of Kanawha county, dated June 1st, 1852, which is part and parcel of ninety-three thousand and twenty-six acres and an half, granted by the Commonwealth of Virginia to Robert B. James, deceased, Frederick Mullineaux, and John Pollock, by patent bearing date the twenty-first day of August, one thousand eight hundred; which tract of land is situated in Kanawha county, in said State of Virginia, on the waters of the Kanawha and Coal rivers, and was granted to said James Mullineaux Pollock and their heirs, as tenants in common, in unequal quantities, to wit: To the said Robert B. James deed fifty-nine thousand and seventeen acres and a half; to the said Frederick Mullineaux twenty-eight thousand three hundred and eighty acres and two-thirds, and to the said John Pollock five thousand seven hundred acres, and also all the right, title, and interest of the said parties of the first part to the portion of the said tract, formerly the property of the said Mullineaux, described in a certain deed of partition of the said tract, dated July sixteenth, one thousand eight hundred and nineteen, filed in the office of the clerk of Kanawha county for record, August twenty-first,
205 one thousand eight hundred and nineteen, as follows: Beginning on Fields creek, where the line of the said survey of ninety-three thousand and twenty-six acres and a half crosses the same; thence up the said creek, following its meanders and joining and running with the lines of a survey and sale made by Samuel D. Honeyman, in his own right and as attorney to Leonard Morris, Charles Morris, and Andrew Donnally, junior, and dated the 29th day of June, one thousand eight hundred and eighteen, to the main head of said Fields creek, to a corner of the said Charles and Leonard Morris and Andrew Donnally, junior, situated on the top of the dividing ridge between the waters of Coal river and Kanawha river; thence — a straight line to the mouth of Three-Mile creek, above the house of Poindexter Tony, on the north fork of Coal river; thence up said fork of Coal river to the mouth of Joe's creek, on the lines of the original survey; thence with the same lines to Slaughter's creek; thence with the same lines down Slaughter's creek to near its mouth, upon the Kanawha river, to a corner of the original survey; thence with the lines of the said original survey to Fields creek to the place [of] beginning; said ten thousand acres being the remainder of said tract of thirteen thousand five hundred and twenty-five acres after a deduction for prior claims of fifteen hundred and seventy-four acres, and after saving and except-
206 ing therefrom nineteen hundred and fifty-one acres to be cut off from the most southerly parcel of said tract of thirteen thousand five hundred and twenty-five acres by a due east and west line, together with all mines, metals and minerals, water-courses, ways and rights of ways, tenements, improvements, hereditaments, and appurtenances whatsoever thereunto belonging or in anywise appertaining, and reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right,

title, interest, property, possessions, claim, and demand whatsoever, as well in law as in equity, of the said company of, in, and to the same and every part and parcel thereof, with the appurtenances; to have and to hold the same and every part thereof, with the appurtenances, unto the said party of the second part and his successors upon the following trusts, viz: In case said company shall fail to pay upon demand the principal of said bonds, or any part thereof, when the same become due and payable, or in case it shall, either from failure to negotiate said bonds in whole or part or from any other cause, be unable or neglect to pay any debt which it may have contracted or incurred, or which it may hereafter contract or incur, then, upon the written request of the holders of any such bonds or debts, the said party of the second part and his successors shall enter into and upon said premises and property, or any
207 part thereof, and take possession thereof, and as the attorney in fact or agent of said company, by himself or his agents or substitutes duly constituted to hold, use, or employ the same, making from time to time all needful repairs, alterations, and additions thereto, and after deducting the expenses of such use, repairs, alterations, and additions, to apply the proceeds thereof to the principal and interest of all bonds and debts of said company then unpaid, or said party of the second part or his successors, at his or their discretion, may, or on the written request of the holders of at least one-half in amount of all bonds & debts of said company then unpaid shall, cause the said premises and property, or so much thereof as shall be necessary to pay and discharge the principal and interest of all said bonds and debts then unpaid, to be sold at public auction in the city of New York, in the State of New York, giving at least sixty days' notice of the time, place, and terms of such sale, and of the specific property to be sold, the same wherever required by law, and also — two newspapers of good circulation in said city, and shall execute and deliver to the purchaser or purchasers thereof a good and sufficient deed of conveyance in fee-simple for the same, which shall be a bar against said company, its successors and assigns, and from all persons claiming under it or them, of all estate, right, interest, or claim in or to said premises or property, or
208 any part thereof, and, after deducting from the proceeds of said sale the costs and expenses thereof and of managing said property, shall apply so much of the balance as may be necessary to the payment of the principal and interest of said bonds and debts, and shall restore the residue thereof to the said company, its successors or assigns. And said company, for the said consideration, further hereby covenants and agrees with said party of the second part, his successors and assigns, that in no case or contingency whatever shall any claim or advantage of any valuation, appraisement, or extension laws be taken by the said company to prevent such entry or sale aforesaid; and further that it will execute and deliver any further reasonable and necessary conveyance of said premises or property, or any part thereof, to said party of the second part and his successors, for more fully carrying into effect the object of these presents, particularly of any property acquired by said

company subsequent to the execution and delivery hereof; and further that the money borrowed or raised upon the security of said bonds shall be faithfully applied to take up and cancel said old issue of bonds and in the prosecution of the usual and ordinary business of said company; and it is mutually agreed between the parties hereto, and these presents are expressly upon
[the] condition, that if said company shall pay the principal
209 and interest of said bonds at maturity, and pay all said debts
incurred or to be incurred by said company during the space of three years from the date hereof, then these presents and the estate hereby granted shall cease and be void, and said property shall revert to and revest in said company, without any acknowledgement of satisfaction, reconveyance, re-entry, or other act; and it is also mutually agreed between said parties that said party of the second part and his successors shall be entitled to and be paid proper compensation for every labor or service performed or expense incurred by him or them in the discharge of his trust in case he shall be compelled to take possession of said premises, or any part thereof, or manage the same; and, in case said party of the second part shall die, resign, or become incapacitated from acting in the premises, the supreme court of the State of New York may appoint a new trustee, being a resident of that State, in his place on the application of said company; or, if the company shall neglect to make such application for thirty days, then, upon the application of the holders of a majority in amount of said bonds, if all of them shall be issued and *and*, if not, then upon the application of the holders of a majority in amount of such of said bonds as may be issued, and out of the
debts then incurred by said company; and thereupon said
210 new trustee shall become vested, for the purposes of this trust, with all the estate, rights, title, and interest and power hereby conveyed to or vested in said party of the second part without any further assurance or conveyance for the same, but if any shall be necessary then the same shall be executed for such purpose.

In witness whereof, on this first day of July, eighteen hundred and fifty-five, the said company has caused these presents, in triplicate, to be sealed with its corporate seal and attested by the president; and, in further witness whereof, said party of the second part has also set his hand and seal to these presents in triplicate.

{ Seal Winifrede Mining and Manufacturing Company, Virginia, } Chartered 16th Feb'y, 1850 }

GOV'R S. BIBBY, *Pres't.*
JAMES J. RING [SEAL.]

Signed and sealed and delivered in the presence of—
RICH'D OAKLEY.
MOSES B. MACLAY.

At a meeting of the board of directors of the Winifrede Mining & Manufacturing Company, Virginia, had on the 24th day of July, 1855, at which were present Gov'r S. Bibby, president; Mr. Richard

W. Hantley, John Dean, James S. Ring, Edward F. Davison, James C. McAndrew, and William R. Travers, all directors, and
211 being a majority of the whole board, the following preamble and resolution *was* presented: Whereas the mortgage deed to James J. Ring, trustee, being for the security of the bonds ordered to be issued to the extent of $300,000 *dollars*, and to secure the payment of other claims on the company, was presented, read, and approved; whereupon it was resolved unanimously that the president execute said mortgage of trust in triplicate simultaneously with the trustee, James J. Ring, and that the seal of this company be affixed thereto, and the same then delivered to the trustee to be sent forward to Ohio & Virginia for record.

"Extract from the minutes."

Attest: RICH'D OAKLEY,
Secretary.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Moses B. Maclay, residing in the city and county of New York, a commissioner appointed by the Governor of the State of Virginia for the said State of New York, certify that on this twenty-fourth day of July, in the year one thousand eight hundred and fifty-five, Gouverneur S. Bibby, president of the Winifrede Mining and Manufacturing Company of Virginia, with whom I am personally acquainted, and whose name is signed to the within and foregoing indenture, bearing date the first day of July, in the year one
212 thousand eight hundred and fifty-five, hath acknowledged the same before me, in my State aforesaid; and I further certify that the said Governeor S. Bibby, being by me duly sworn, deposes and says that he resides in the city and county of New York; that he is the president of the Winifrede Mining and Manufacturing Company; that the seal affixed to the foregoing instrument is the corporate seal of the president, directors, and company of the said The Winifrede Mining and Manufacturing Company of Virginia, and was affixed to the said instrument by order of the directors for the uses therein expressed, and that he, by like order, did subscribe his name thereto as president of said company; and I, the said commissioner, further certify that at the same time, on the twenty-fourth day of July, 1855, James J. Ring, trustee, whose name is signed to the foregoing conveyance, bearing date on the said first day of July, 1855, personally appeared and acknowledged the same before me in my State aforesaid.

Given under my hand and seal of office at my office, in the city of New York, this twenty-fourth day of July, one thousand eight hundred and fifty-five.

[Seal. Moses B. Maclay, Commissioner for Virginia in New York.]

MOSES B. MACLAY,
Virginia Commissioner in the City of New York, 51 Liberty Street.

213. VIRGINIA:

KANAWHA COUNTY COURT CLERK'S OFFICE,
30th July, 1855.

This deed of mortgage was this day presented to me, and thereupon, together with the certificates thereto annexed, admitted to record.

Teste: A. W. QUARRIER, *Clk.*

A true copy from the records in my office.

Teste: HAMILTON MORRIS,
Clerk Kanawha County Court.

The foregoing indenture is endorsed as follows:

"Exhibit filed January 7, 1882, before me during the taking of the testimony in the suit of Theodore Wright *vs.* James D. McConihay, Trustee, & *als.*, filed by counsel for Theodore Wright, pl'tff, James F. Brown, counsel for def'ts, being present & consenting to said filing. D. C. Gallaher, U. S. com'r."

KANAWHA COUNTY, W. VA.

On the first day of March I promise and bind myself, my heirs, assigns, to pay to John A. Diddle the sum of twenty dollars, it being for rent of land & house at the mouth of Fields creek, at Winifrede depot, where I now live. I also promise to pay the am't of
214 my rent on or before the first day of January, 1876, and said John A. Diddle agrees and binds himself to let the said Rob't H. Keeney have possession of said house & land until the first day of March, 1876, at which time I am to return the same to him in as good repair as received, wear and tear excepted.

Witness my hand and seal this first day of March, 1875.

R. H. KEENEY. [SEAL.]

The last foregoing writing is endorsed as follows:

"1875. Rob't H. Keeney's rent bond, $20.00, No. 10. J. A. D. No. 1. Filed with the depositions of John A. Diddle. D. C. Gallaher, U. S. com'r."

KANAWHA COUNTY, W. VA:

On the first day of March, 1874, I promise and bind myself, my heirs and assigns, to pay Jno. A. Diddle the sum of twenty dollars, it being for rent of house and land at the mouth of Fields creek, at Winifred depot, where I now live. I also promise to pay the amount of my rent on or before the 1st day of January, 1875, and said John A. Diddle agrees and binds himself to let the said Rob't H. Keeney have possession of said house and land until the 1st day of
215 March, 1875, at which time I am to return the same in as good repair as received, wear & tear excepted.

Witness my hand and seal this 1st day of March, 1874.

R. H. KEENEY. [SEAL.]

The last foregoing writing is endorsed as follows:

"1874. Rob't H. Keeney. $20. No. 11. Exhibit 'J. A. D. No. 2.' Filed with deposition of J. A. Diddle. D. C. Gallaher, U. S. com'r."

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, May 20, 1882—

This day J. D. McConihay, Trustee, *et als.* tendered their petition praying a rehearing of this cause and of the matters contained in the decrees therein entered, and moved the court to set aside the decree of March 11, 1882, in said cause for errors upon the face of said decree, which petition is ordered to be filed, but without concluding any of the questions raised therein, and all executions upon the decrees in the cause are stayed till the further order of this court.

216 The petition referred to in the foregoing order filing the same is in the words and figures following, to wit:

In the District Court of the U. S. for the District of W. Va. In Chancery.

THEODORE WRIGHT *vs.* JAS. D. MCCONAHAY *et als.*

Petition of J. D. McConaha, Trustee, *et als.* for a rehearing of the decree entered against them *et als.* in the above-entitled cause on the 11th day of March, 1882.

To the Hon. J. J. Jackson, judge of said court:

Your petitioners, respondents in the joint answer of J. D. McConahay, Trustee, *et als.* filed in the above cause, respectfully represent that on the 24th of September, 1881, said Theodore Wright filed his bill in the clerk's office of your honor's court at Charleston, West Va., alleging that at a sale made under a decree entered in a certain cause pending in said court, in which H. A. Cram was plaintiff and E. A. Bibby *et als.* were defendants, he became the purchaser, among other things, of a road-bed right of way over petitioners' lands,
217 theretofore purchased by said Cram at a judicial sale in the case of The Bank of Virginia against the Winifrede Mining & Manufacturing Company *et als.*, lately pending in the circuit court of Kanawha county, W. Va., which company had acquired the same by condemnation from petitioners' grantor for the purpose of building and operating a railroad, & had constructed said railroad over the same, by reason whereof complainant alleged he had perfect title thereto. He further alleged that petitioners had notified him not to enter upon said property, and prayed that petitioners be required to assert their title, if any, in this suit, & and that he be quieted in his title.

To which bill petitioners filed their demurrer, which was overruled, and thereupon filed their answer to the bill, alleging that they were purchasers of said property from Jno. McConiha, Sr., against whom said condemnation proceedings had been had, and further alleged and proved that said Winifrede Co. and its successors had abandoned said railroad, and further showed that said road had not been used for said purposes since the year 1869. Petitioners further showed with said answer the charter of said company, whereby it was authorized to institute said condemnation proceedings & also

the statute under which the same were had, and showed by
218 said statute that upon the failure of said company to use and operate said railroad for public travel for the period of three consecutive years the land so acquired by condemnation as aforesaid should revest in the former owner; that the said property, by reason of the said non-user, did revest in the said Jno. McConiha, Sr., prior to the said conveyance to petitioners, and passed to them by said deed and so remained.

They further showed & proved that the said Cramm never purchased said property at judicial sale, as alleged in the bill, and further showed & proved that neither the said Cramm nor any one under him ever held any adversary possession of the land in controversy in color of title.

Petitioners further showed that afterwards, to wit, on the 11th day of March, 1882, at the instance of complainant, an order purporting to be a final decree was entered in said cause in vacation, when no term of your honor's court was being held, whereby the complainant's title was declared established against your petitioners and they forever enjoined from interfering with complainants and those under him in the use and enjoyment of the property in question and further decreeing against petitioners the whole costs of suit.

Your petitioners further show that said cause was heard and said decree directed in the city of Parkersburg, W. Va., many
219 miles, to wit, upwards of 150 miles by the ordinary route of travel, from the place fixed by law for the trial of said cause; to wit, the city of Charleston, W. Va.; that said cause was heard and determined and said decree entered in the absence of petitioners and their counsel during the vacation of said court and upon papers and proofs never before filed in said cause; that at the time of said hearing & determination the counsel, upon whom petitioners relied to argue and present said cause, to wit, Messrs. Wilson and Ferguson, who had been employed by petitioners for that purpose, were serving as members of the Legislature of the State of West Virginia and discharging the public duties required of them by law as such members at Wheeling, W. Va., of which fact complainant & his counsel had full notice at the time of fixing the day of said hearing, and at the time of said hearing *and* petitioners' sole remaining counsel, J. F. Brown, was engaged as attorney in trying — cause in the State court at Charleston, then in session.

Petitioners further show that the only notice of said hearing given was served upon said Brown, who protested against said hearing and was then informed by complainant's counsel that he, complainant's counsel, had fixed the day mentioned in said notice without consultation with the judge and did not know whether or not he would be at Parkersburg on the day named for said hearing, but further stated that he had written to the judge and
220 would advise petitioners' counsel as to whether or not the judge would be there, which facts were communicated to those of petitioners who were appointed by their codefendants to look after the defence of said suit. Petitioners further say that

neither they nor their said counsel were ever so advised and did not know that said hearing would be pressed until too late to attend; that, influenced by and relying upon the aforesaid statement of complainant's counsel and the advice given by their own counsel, your petitioners, who were already at great expense in procuring counsel & preparing for their defence, relied upon a postponement of said hearing till the next succeeding term of your honor's court, then to be held in less than two months after the day fixed in the notice, and were not represented at any hearing.

Petitioners further say that at said hearing in their absence many papers were filed and read in evidence which had never before been filed in the cause, either in court or in the clerk's office, among which were many improper to be filed, to the filing of which petitioners had no opportunity to object, and especially the so-called disclaiming of certain *of certain* of the defendants to the bill.

221 Your petitioners are informed, believe, and charge that there is no authority whereby the said cause might be finally heard or the aforesaid decree of Mar. 11, 1882, might be made and entered in vacation of the court or said papers or proofs filed as aforesaid in the cause, and charge that the aforesaid action in that behalf is irregular and void.

They further say that there are errors upon the face of said decree, as follows, to wit: that by it, it is determined, 1st, that the property in controversy did not revest in petitioners' grantor by the non-user aforesaid and by his conveyance to petitioners pass to them; 2nd, that the title to said property passed to said Cram by his said purchase at judicial sale; 3rd, that complainant has title & petitioners none to the said property; 4th, it was error to hear said cause and render a final decision therein in vacation, especially in the absence of petitioners and their counsel, and especially under the circumstances of this case. It was error to file and consider as proof the papers aforesaid first and only filed by said decree and many other errors.

Petitioners further say that no term of your honor's said court has intervened since the hearing aforesaid & entry of said decree.

222 By reason whereof and of said decree petitioners have been greatly aggrieved and injured, and have been deprived of their property, worth many thousand dollars, and therefore pray that your honor will set aside said decree & grant them a new hearing in the premises & for general relief.

Petitioners file herewith the record of said cause, & pray that it may be taken & considered as part hereof.

J. D. McCONIHA,
Trustee, et als., Named as Defendants in the Joint Answer Filed in the Above-Entitled Cause, by Counsel.

FERGUSON & WILSON & J. F. BROWN, *Sol's.*

UNITED STATES OF AMERICA, }
Dist. of West Virginia, Kanawha County, } *ss:*

James F. Brown, being duly sworn, deposes and says that he has

read said petition & knows the contents thereof, and that the facts and allegations thereof are true of his own knowledge, except so far as stated on information & belief, & as to this he believes them to be true.

JAS. F. BROWN.

Subscribed & sworn to before me this 17th day of May, 1882.
JASPER Y. MOORE,
Clerk D. C. U. S., D. W. V.

223 And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston November 18th, 1882—

This cause came on this day to be further heard upon the papers heretofore read and was argued by counsel. Upon consideration whereof the court declines to alter or modify the decree entered in this cause at chambers on the 15th day of March, 1882, except that the cause will not be retained for further orders, as provided in said decree, the decree now entered — being filed affirming and establishing the said decree entered on the said 15th day of March, 1882, as the judgment of the court at its present term; but in taxing the costs of this suit the clerk is directed not to tax the costs of the entire record in the chancery cause of the Bank of Virginia against Winifred Mining & Manufacturing Company, which has been filed as evidence, but only the costs of the bill and cross-bill in said record; and the defendants, desiring an appeal from the judgment and decree of the court herein to the Supreme Court of the United States, such appeal is allowed the said defendants, or any or either
224 of them, upon they, or either of them, entering into bond within 30 days before the clerk of this court with good security in the sum of $1,000 *dollars*, conditioned according to law; and the court certifies that the property involved in this suit is of greater value than $5,000.00, and the parties hereby agree that in preparing the record for the Supreme Court it shall be unnecessary to copy in said record the record of the suit of the Bank of Virginia *vs.* The Winifrede Mining and Manufacturing Company and others, except so far as either party may require.

The following are papers copied from the record of the Bank of Va. *vs.* Winifred M. & M. Co., mentioned in the foregoing order, at the instance of the counsel for the appellants, and in pursuance of said order, in addition to the others hereinbefore copied as exhibits & proofs.

225 The separate answers of the Winifrede Mining and Manufacturing Company of Virginia to the bill of the president, directors, and company of the Bank of Virginia and others filed against them and others, in Kanawha circuit court, Virginia.

Respondent, saving, &c., answers and says that the claims of the several plaintiffs appear to be correctly set forth in the bill; that there are other judgment liens upon the lands of the Winifred Mining and Manufacturing Company (respondent), all of which,

including the judgments of the plaintiffs, are truly and accurately set forth in a paper writing herewith filed as part of this answer and marked "G," and also endorsed "1860." "The Bank of Virginia and others *vs.* The Winifred Mining and Manufacturing Company and others." "Table referred to in report as marked G." And the said judgments are also set out in another paper writing herewith filed as part of this answer, marked (copy) ("H").

These judgments are still due and unpaid, and the company has no personal estate with which to pay them. The lands of
226 the company (respondent) are truly set out in the bill, some 10,000 acres, lying mostly in the county of Kanawha, but partly in Boone county, Virginia. The rents and profits from the lands of respondent will not discharge the said liens in five years, and it is not believed that they would keep down the interest accruing upon the judgments; that it is true that on the first day of July, 1855, the company (respondent) did execute to James J. Ring, deceased, a trust deed, as set out in the bill. A true copy of this trust deed is filed with the bill. The directors' meeting which ordered the president of the company (respondent) to give and make and execute the trust deed was held in the State of New York and not in Virginia. The deed was made in New York and not in Virginia, and the name and seal of the company were signed and affixed to the trust deed aforesaid in the State of New York and not in Virginia. This trust was afterwards recorded in the clerk's office of Kanawha county court. It has achieved no practical results and has long since been regarded by all parties as null, void, and inoperative. It failed of the object for which it was intended; that after the death of Mr. Ring the supreme court of the State of New York appointed J. P. Crosby, Esqr., to fill the vacancy in the trust
227 occasioned by Mr. Ring's death, as will appear by an authenticated transcript from the records of that court filed with bill marked ("L").

Respondent having thus answered prays hence to be dismissed, &c.

New York, April 3, 1860.

[SEAL] GOUV'R S. BIBBY,

For the Winifrede Mining and Manufacturing Company, of Virginia.

In presence of—

JAS. C. HARRIOTT.

228 *Report of Sale.*

BK OF VA. *vs.* W. M. & M. CO.

To the Honorable Daniel Polsby, judge Kanawha circuit court:

Your commissioner will respectfully represent unto your honor that in pursuance of a decree rendered in your honor's court in the case of the Bank of Virginia and others *vs* The Winifrede Mining and Manufacturing Company and others, and John P. Crosby, trustee, complainant, *vs.* The Winifrede Mining and Manufacturing

Company and others, on cross-bill, on the 26th day of January, 1861, he advertised to be sold that valuable tract of 10,000 acres of land belonging to the Winifrede Mining and Manufacturing Company, lying in the counties of Boone and Kanawha, and fully set forth in the papers of the cause, together with all the railroad iron, engines, cars, picks, shovels, and all other utensils upon the property used in the mining and shipping of coal. This property was advertised to be sold on the 26th day of October, 1865, according to the requirements of the decree, in the New York Journal of Commerce, a newspaper printed and published in the city of New

229 York; The Republic, a newspaper printed and published in the city of Richmond, Virginia, and of larger circulation than any other paper in that city (The Richmond Examiner had ceased to be printed and published among the public journals of the day), and in the Kanawha Republican, a newspaper printed and published in the town of Charleston, West Virginia, and a newspaper of the largest circulation in that town. (The Kanawha Valley Star, a paper printed and published in the town of Charleston, had ceased to be printed and published among the public papers of the day.) That he furnished to the counsel of all the parties to this suit a separate copy of the notice of sale for every stockholder, as required by the decree; that on the day preceding the 26th day of October, 1865, the day fixed for the sale, your commissioner caused hand-bills to be printed, circulated, and posted in the town of Charleston, fixing the hour of sale of this property at 3 o'clock p. m., 26th day of October, 1865. Duly authenticated copies of these four several advertisements attend these reports and are filed as parts thereof, marked A, B, C, D, respectfully. The 26th of October, 1865, was fair; it was court day for Kanawha county, and the attendance upon the sale was respectable.

230 The property was offered from 3 o'clock p. m. to 5½ p. m., at the front door of the court-house of Kanawha county. There were numerous bids. At 5½ p. m. it was knocked off to Henry A. Cram, of New York, who was the highest bidder, at $80,000. Henry A. Cram paid to your commissioner at the time of the sale $7,500, and has since executed and forwarded to your commissioner, just before the first day of the present term of this court, his five several bonds for $14,500 each, with N. Dane Ellingwood, a gentleman of fortune well known to your commissioner, as his security in each bond. These bonds are herewith filed, marked 1, 2, 3, 4, 5, respectfully. This delay in forwarding the bonds was caused by circumstances beyond the control of Mr. Cram, who was acting for himself and other bond and stock holders interested in the Winifrede property. The sum of $80,000 is sufficient to cover all the indebtedness of the Winifrede Company to outsiders. This sale has met the approval of all the parties to this cause and their counsel. After paying taxes and costs, shown by paper herewith filed, marked E, together with all proper vouchers, there still remains to the credit of this cause in the hands of your commissioner $2,356.36.

231 Your commissioner respectfully asks that this sale may be confirmed by the court; that he be ordered to pay out the

sum of $2,356.36, now remaining in his hands, to the several parties entitled thereto under the decree of the 26th of January, 1861, and that after having given bonds according to law he be ordered to collect and distribute the 1st bond for $14,500, with its interest, according to the decree of [the] 26th of January, 1861. Your commissioner entered into bond before the clerk of your honor's court in the penal sum of $10,000, according to the requirements of the decree, before he made the sale. A copy of this bond is filed herewith, marked G. All of which is respectfully submitted.

2d of April, 1866.

THOMAS B. SWANN,
Special Commissioner.

The paper marked E, referred to in the foregoing report, is omitted here.

232 *Decree of Confirmation of Sale.*

B'K OF VA. *v.* W. M. & M. CO.

THE BANK OF VIRGINIA and *als.*; Compl'ts,
vs.
THE WINIFRED- MIN'G & M'NG COMPANY & Others, Def'ts, } In Chancery.

And

JOHN P. CROSBY, Trustee,
vs.
THE WINIFRED- MIN'G AND MAN'G CO. & Others, Def'ts. } In Chancery. On Cross-Bill.

These causes came on this day to be further heard upon the papers heretofore read and former proceedings had therein, and the report of Special Commissioner T. B. Swann, filed at this term of the court, together with the papers referred to in said report, and were argued by counsel. Upon consideration whereof, and in pursuance of the covenant and agreement of the parties, by their counsel, hereto appended and signed by the respective counsel as part of this decree, the court doth adjudge, order, and decree that the sale of the Winifrede property of 10,000 acres (ten thousand acres) of land, together with the railroad iron, cars, shovels, engines, picks, and other property made by Commissioner T. B. Swann of the 26th day of October, 1865, at the front door of the court-house of Kanawha county, at which sale Henry A. Cram, of New York, was the purchaser at the price of $80,000, be, and the same is hereby, with
233 the like consent and agreement of the said parties, confirmed.

And the court doth further adjudge, order, and decree, with the like consent and agreement, that the report of Commissioner Swann, before referred to, be, and the same is hereby, confirmed, and with the like consent and agreement the court doth further adjudge, order, and decree that Commissioner Swann do proceed to pay over to the several parties entitled thereto the sum of $2,239.11, the sum

remaining in his hands to the credit of this cause, as shown by his report, according to the terms and provisions of the decree of the 26th of January, 1861, and that he make report of his proceedings to the next term of this court, until which time this cause is continued; and the report and account of George Jeffries, filed in this suit, as superintendant of the property of the Winifred Company, and also as receiver & manager of said property before his appointment by the court, with the like consent and agreement, is hereby confirmed; and with like consent and agreement it is ordered that payment of the sum of eleven thousand six hundred & forty dollars & sixty-eight cents ($11,640.68), with interest on $9,988.64, the principal of said sum, from the 26th day of October, 1865, until paid, being the amount due him on said accounts, the same to be paid as a part of the costs of this suit out of the first funds that may hereafter come to his hands to the credit of this suit. (Endorsement consenting to decree omitted.)

234 And now at this day, to wit, at a district court of the United States for the district of West Virginia, on the 24th day of August, 1883, the day and date first hereinbefore mentioned—

On application of the several defendants in the above-entitled cause lately pending in this court, praying an appeal from the final judgment and decree entered therein, an appeal is allowed such applicants, as prayed for, and the penalty of the appeal bond therein is fixed at $1,000, whereupon the said applicants presented and filed an apt and sufficient bond in the penalty aforesaid, with good security, and conditioned as required by law, which bond and security is approved by the court; and the court certifies that the matter involved and in controversy and dispute in the said suit is of greater value than $5,000, exclusive of costs; and on motion of the said applicants the order heretofore entered in this cause awarding an appeal from said judgment and decree is set aside, so far, and so far only, as the same interferes with or conflicts with the appeal here granted.

Which bond, referred to in the last foregoing order, is in the words and figures following, to wit:

235 *Bond.*

Know all men by these presents that we, James D. McConihay, trustee, and James F. Brown, are held and firmly bound unto Theodore Wright in the just and full sum of one thousand (1,000) dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Sealed with our seals and dated this 5th day of December, 1882.

The condition of the above obligation is such that whereas lately at a district court of the United States for the district of West Virginia, holden at Charleston on the 18th day of November, 1882, in the chancery cause therein pending, wherein Theodore Wright is complainant and James D. McConihay, trustee, and others are defendants, a decree was rendered against the said James D. McConi-

hay, trustee, & others, defendants, and in favor of the said complainant, Theodore Wright; and whereas an appeal has been, by the said decree, allowed to the said defendants, or any or either of them, and all the said defendants, except John H. McConihay, desiring to avail themselves of such appeal, now, therefore, if the said James D. McConihay, trustee, and the other defendants in said cause
236 (except the said John H. McConihay) shall prosecute their said appeal to effect and answer all costs and damages if they should fail to make good their plea, then this obligation to be void; else to remain in full force.

JAMES D. McCONIHAY, *Trustee.* [SEAL.]
JAMES F. BROWN. [SEAL.]

Acknowledged before and approved by me December 5th, 1882.
Teste: JASPER Y. MOORE,
Clerk D. C. U. S., Dist. West Va.
By HENRY C. McWHORTER,
Deputy Clerk.

Approved in open court August 24th, 1883.
Teste: JASPER Y. MOORE, *Clerk.*

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, certify that the foregoing is a true and correct transcript of the record of a cause lately pending in my said court, at Charleston, wherein Theodore Wright was complainant and James D. McConaha & others were defendants, as fully and completely as the same appears in the records and files of my said court, omitting such portions as are mentioned as being omitted from this transcript.

In testimony whereof I have hereto subscribed my name and affixed the seal of my said court at Charleston the 10th day of October, A. D. 1883.

[Seal District Court United States, District West Virginia, Charleston, West Va.]

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

Clerk's fee for this record, $95.20.

Endorsed on cover: West Virginia D. C. U. S. No. 159. James D. McConihay, trustee, *et al.*, appellants, *vs.* Theodore Wright. Filed 12th October, 1883.

121-201

RECEIVED
JAN. 27 1887
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

JAMES D. McCONIHAY, TRUSTEE, ET. ALS.,
Appellants.

vs.

THEODORE WRIGHT.
Appellee.

BRIEF FOR APPELLANTS.

THE KANAWHA GAZETTE, PRINT

IN THE

SUPREME COURT OF THE U. S.

JAMES D. McCONIHAY, TRUSTEE ET. ALS., APPELLANTS,

vs.

THEODORE WRIGHT, APPELLEE.

BRIEF FOR APPELLANTS.

This is an appeal from the District Court of the *United States* for the District of *West Virginia*.

September 24, 1881, Theodore Wright filed his bill alleging that he had purchased at judicial sale a large tract of coal land with a "right of way" connecting it with the Kanawha river; that when about to enter thereon, he found the right of way posted with notice, that the same was claimed by defendants, and that trespassers would be prosecuted to the full extent of the law; praying an injunction restraining the defendants from preventing him from taking possession of the "way," or suing him; and that the defendants be required to maintain or relinquish their claim of title in this suit. The injunction was granted as prayed for. The defendants demurred to the bill; the demurrer was over

ruled: whereupon they answered denying the plaintiff's title and alleging perfect title in themselves. On March 11, 1882, the case was heard upon its merits in chambers at Parkersburg during the vacation of the Court and in the absence of the defendants, and the injunction perpetuated. Upon petition of defendants to rehear the cause filed at the next term, the former decree was affirmed, and from that decree the defendants have appealed.

STATEMENT OF THE CONTROVERSY.

The subject of controversy is a strip of land formerly owned by the grantor of the defendants, and afterwards condemned for railroad purposes by the *Winifrede M. & M. Co.* under whom the plaintiff claims. The defendants claiming a reversion, by reason of the abandonment of the use of the land for the purposes for which it was condemned. The history of the controversy and the statutes which gave to it, are as follows:

On March 11th, 1837, the General Assemby of *Virginia* passed an act entitled, "*An act prescribing certain general regulations for the incorporation of railroad corporations.*" This act, after providing in detail the manner of organizing railroad companies; defining the powers of the Directors, conferring power to condemn land for "rights of way" and depot purposes, and providing for the assessment of damages therefor; proceeds—

10. "It shall be the duty of the said freeholders, in pursuance of the order appointing them to assemble on the land proposed to be condemned, and after viewing the same and hearing such proper evidence as either party may offer, they shall ascertain, according to the best of their judgment the damages which the proprietor of the land will sustain by the condemnation thereof for the use of the company. In performing this duty, they shall consider the proprietor of the land as being the owner of the whole fee simple interest therein; they shall take into consideration the quantity and quality of the land to be condemned, the additional fencing which will be required thereby, and all other inconven-

fiences which will result to the proprietor from the condemnation thereof, and shall combine therewith a just regard to the advantages which the owner of the land will derive from the construction of the railroad for the use of which his land is condemned. Provided, That not less than the actual value of the land, without reference to the location and construction of the road, shall be given by the commissioners.

11. "When the said freeholders shall have agreed upon the amount of damages, they shall forthwith make a written report of their proceedings, under their hands and seals, in substance as follows: 'We ————, freeholders, appointed by an order of the county court of ————, for the purpose of ascertaining the damages which would be sustained by ————, the proprietor of certain lands in said county, which the president and directors of the ———— company propose to condemn for their use, do hereby certify, that we met together on the land aforesaid, on the ——— day of ———, the day appointed therefor by the said order, (or the day to which we were regularly adjourned from the day appointed for our meeting by the said order,) and that having been first duly sworn, and having viewed the premises, we proceeded to estimate the quantity and quality of the land aforesaid, the quantity of additional fencing which would probably be occasioned by its condemnation, and all other inconveniences which seemed to us likely to result therefrom to the proprietor of said land; that we combined with these considerations, as far as we could, a just regard to the advantages which would be derived by the proprietor of said land from the construction of the railroad, for the use of which said land is to be condemned; that under the influence of these considerations, we have estimated and do hereby assess the damages aforesaid, at the sum of ———. Given under our hands and seals, this ——— day of ———.' At the foot of the report so made, the magistrate before whom the said freeholders were sworn or affirmed, shall make a certificate in substance as follows: '———— county, to wit: I, ————, a justice of the peace for said county, do hereby certify, that the above named freeholders, before they executed their duties as above certified, were solemnly sworn (or affirmed) before me, that they would impartially and justly, to the best of their ability, ascertain the damages which would be sustained by the above named ————, from the condem-

nation of the above mentioned land for the use of the ——— company, and that they would certify truly their proceedings thereupon to the court of the said county. Given under my hand this —— day of——."

12. "The report of the freeholders so made, together with the certificate of the magistrate as aforesaid, shall be forthwith returned by the said freeholders to the court of the county; and unless good cause be shown against the report, it shall be confirmed by the court and entered of record. But if the said report be disaffirmed, or or if the said freeholders being unable to agree, shall report their disagreement, or if from any other cause they should fail to make a report within a reasonable time after their appointment, the court may, at its discretion, as often as may be necessary, supersede them or any of them, appoint others in their stead, and direct another view and report to be made, in the manner above prescribed. In default of the payment or tender of the amount of damages so assessed, to the proprietor, or of the payment of the same into court, when, for good cause shown, the court shall have so ordered it, the court shall render judgment in favor of such proprietor for the amount of such damages, and double costs; and may thereupon either compel the company to pay the same into court, or award process of execution therefor, as to them may seem right. And when such judgment shall be satisfied by the payment of the money into court or otherwise, the title of the land for which such damages were assessed, shall be vested in the company in the same manner as if the proprietor had sold and conveyed it to them."

And then after authorizing the taking of materials from adjacent lands, further proceeds—

20. "The work of the company shall be executed with diligence, and if they be not commenced within two years after the passage of the act of incorporation, and finished within the period which may be therein prescribed; and in case the company, at any time after the said road is completed, shall abandon the same, or cease to use and keep it in proper repair, so that it shall fail to afford the intended accommodation to the public for three successive years, then and in that case, also, their charter shall be annulled as to the company, and the State of Virginia may take possession of the said rail

road and works, and the title thereto shall be vested in the said State so long as it shall maintain the same in the state and manner required by said charter; otherwise the lands over which the said road shall pass, shall revert to and be vested in the person or persons from whom they were taken, by concession or inquisition, aforesaid, or their heirs or assigns."

And by section 22—

22. "Upon the railroad the company shall have the exclusive right of transportation, and when a portion thereof, shall be opened for transportation, they shall at all times furnish and keep in good repair the necessary machines, carriages and other requisites for the safe and convenient transportation of persons and property. It shall be their duty, at all times, upon the payment or tender of the lawful or customery tolls, to transport to any convenient place of delivery on the railroad, which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, or offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but as far as practicable shall carry each in the order of time in which it shall be delivered or offered for transportation with the tolls paid or tendered. If the company or any of its officers or agents, shall fail to receive transport or deliver in due time, any property so offered or delivered to them, or shall fail to take up or set down any passenger or passengers at such convenient point as he or they may desire, upon the payment or tender of the passage money, or shall demand and receive more than the lawful tolls or rate of transportation, they shall forfeit and pay to the injured party, not less than twenty-five nor more than one hundred dollars, at the discretion of the court, to be recovered by motion, in the county or corporation court, or superior court of law for the county or corporation in which such preference has been given; or in which they have refused to comply with the requisitions of this section."

The residue of the chapter provides in detail as to tolls allowed; and minor regulations for the management and operation of the railroad; except section 35, which is as follows:

35. "Any part of any charter or act of incorporation granted agreeably to the provisions of this act, shall be subject to be altered, amend or modified by any future legislature, as to them shall seem proper; except so much thereof as prescribes the rate of compensation or tolls for transporation: *Provided*, That the rights of property acquire under this act, or any other act adopting the provisions of this act, shall not be taken away or impaired by any future act of the legislature."

On the 16th df February 1850 said Assembly passed a *special* act for the incorporation of the *Winifrede Mining and Manufacturing Company*, as follows:

CHAP. 261.—An ACT to incorporate the Winifrede Mining and Manufacturing Company.

[Passed February 16, 1850.]

1. "*Be it enacted by the General Assembly of Virginia:* That Gouverneur S. Bibby, William O'Connor, Richard Oakley and Henry Engle, junior, and such other person or persons as may be hereafter associated with them, shall be and they are hereby incorporated and made a body politic and corporate under the name and style of "Winifred Mining and Manufacturing Company," for the purpose of exploring, digging, mining, raising and transporting coal and minerals and substances, and for manufacturing mineral, vegetable and other articles, in and from the counties of Kanawha and Boone, and such other counties as may hereafter be created out of parts of said counties; and they are hereby invested with all the rights, privileges and powers conferred on such bodies politic and corporate by an act, entitled "An act prescribing general regulations for the incorporation of manufacturing and mining companies," passed February the thirteenth, eighteen hundred and thirty seven, and shall be subject to all the rules, regulations and restrictions provided and prescribed by said act, so far as they are applicable to and not inconsistent with the powers and privileges herein contained and granted.
2. "*Be it further enacted:* That the capital stock of the said company shall not be less than one hundred thousand dollars nor more than one million five hundered thousand dollars, to be divided into shares, of one hundred dollars each; and the said company shall have the right to purchase and hold lands, not exceeding ten thousand acres at any one time, in the said counties of Kana-

wha and Boone, or in any new counties that have been or may hereafter be formed and created out of parts of the said counties.

3. That it shall and may be lawful for the said company to erect and construct a slack-water navigation from some convient point on Kanawha or Coal rivers, contiguous to their said lands, and along the bed of the said Coal river to the Great Kanawha: *Provided, however*, That nothing in this act contained shall be so construed as to prevent the said rivers from being and remaining public highways, free for the navigation of all the citizens of this commonwealth: and also to construct such railroad or railroads from any point on their said lands to the Great Kanawha river or any other navigable stream in the valley of the Kanawha river and its branches, or to connect with any other railroad or improvement which is now or may hereafter be authorized by the State of Virginia in the said valley of the Kanawha and its branches; and to enable the said company to carry out the provisions in this section contained, they are hereby invested with all the rights, powers and privileges, and subjected to all the limitations and restrictions contained in an act, entitled "An act prescribing certain general regulations for the incorporation of railroad companies," passed March the eleventh, eighteen hundred and thirty seven, so far as the same are applicable to and not inconsistent with the provisions of this act."

4. "This act shall be in force from its passage."

Prior to the last mentioned act, an act was passed the codifying the laws of the State, August, 1849, to take effect on July 1, 1850. This act was known as the Code of 1849. By chapter 56 of this Code, it was provided in lieu of section 20 of the act of 1837, as to the title vested by condemnation; as follows:

15. "The company, county, or town, where such judgment is rendered against it, shall thereafter have no right to possession of the land, until the judgment is satisfied. From the time of such satisfaction by the payment of the money to the persons entitled thereto, or into court, or from the confirmation of the subsequent report, if no additional compensation be there by ascertained, or from the time of the termination of the proceedings, if they be determined without such confirmation, the title to

land shall be absolutely vested in the company, county or town, in *fee simple*." (Code 1849, p. 294.)

It will be observed the act of incorporation was passed *after* the adoption of the Code of 1849, but before it took effect.

In 1853, under the foregoing act, of March 11, 1837, (the act mentioned in this charter), this company, by condemnation acquired from *John McConihay*, the grantor of appellants), the lands in controversy, for a right of way and depot purposes for its railroad, and afterward constructed and operated its railroad along the same, from Kanawha River to a boundary of some 10,000 acres of coal and timber lands, acquired by it January 5th, 1883, by deed from G. T. Snow *et al.* lying *behind* the lands owned by *McConihay*. In 1860, certain creditors of the company holding liens upon the 10,000 acre tract brought suit in the Circuit Court of Kanawha county, West Virginia, for the enforcement of their liens. Under decrees in this suit, the 10,000 acre tract was sold, and in 1870 conveyed by a special commissioner to one *Henry Cram*. The *Winifrede M. & M. Company* then ceased to exist as a corporation; its railroad having been abandoned in in 1868 or '69; the rails removed from the track, and together with its rolling stock sold under the decrees in said cause.

In 1878, a bill was filed by the said Cram alleging, that he had, in fact, purchased in trust for himself *and others*; asking a sale of the property so conveyed and a distribution of the proceeds among the beneficiaries of the trust.

On the — of March, 1879, a second amended bill was filed in this cause by Cram, charging a mistake in the conveyance to him, in that the conveyance only granted the *10,180 acre tract*, while his purchase embraced as well, the "right of way" acquired by condemdation; and praying a reformation of the deed, making the Winifrede M. & M. Company, a defendant. On the same day; the same attorney, who filed this amended bill for *Cram*, without process against the company, filed an answer purporting to be its; *but neither under its seal nor signed by any of its officers*; confessing this amended bill;

whereupon a decree was entered, without proof or further pleading, directing a sale of the "right of way" as part of the land held in trust by Cram. Under this decree, the 10,180 acre tract and the "*right of way*" were sold, and purchased by the plaintiff, Wright. Shortly afterwards, the appellants, to whom had been granted by the said *McCanlay* all his lands and interests in lands in that locality by deed of October 30, 1875, (including the lands condemned), learning that said *Wright* by reason of his purchase, made claim to the "right of way," and was threatening to take possession, "posted" the land, and gave notice that they would prosecute as trespassers any one interfering with their possession. Whereupon, *Wright* brought this suit, alleging in his bill, his purchase, and the fact that when about to enter the premises he was confronted with the notice posted by the appellants and was afraid to enter; and praying an injunction restraining the appellants from interfering with him, or suing him. The appellants demurred to the bill for want of equity; and the demurrer being overruled, answered, denying that the plaintiff took any title by his purchase; and alleging perfect title in themselves, under said deed from *John McCanlay*, owner of the land at the time of condemnation; charging that under the act of 1837, under which the condemnation was, the land reverted to their grantor, at the expiration of three years next after the abandonment of the road by the *Company*. Proofs having been taken, the cause, in the absence of appellant's counsel, was heard by the Judge of the District Court in *vacation*, and a final decree ordered and entered, adjudging that the appellants had no rights in the premises, and perpetuating the injunction. At the next term, upon petition to rehear the cause, the Court confirmed the decree, entered in vacation.

The Court erred,

First.—In overruling *the demurrer*.

Second.—In refusing to diss the bill at the hearing.

The demurrer should have been sustained.

This is a clear case of an action of ejectment, tried in a

suit in equity. The pretension of the bill is *legal title* in the plaintiff or his grantors, to the land in controversy, and *claim* to legal title by the defendants, to the same land.

By the statute of *West Virginia* (Code 1868, ch. 90) the action of ejectment may be brought against any one, in possession of, or *claiming title to* or *interest in* the land. There is nothing stated in the bill, to have prevented the plaintiff from suing *at law*, and the remedy at law by ejectment was *adequate* and *complete* on the case made in the bill.

Where there is a *complete* remedy at law, equity has no jurisdiction, unless some distinct ground of equity intervenes. Here *ejectment* was the proper action to determine the right of the parties to the land in controversy, and a court *of law* the proper *forum*; there were no equities nor equitable rights against the defendants, to be determined, or to give equity jurisdiction.

It is true the bill calls the defendants' claim of ownership a "cloud" on his title; but that is the case of every adverse claim for which ejectment may be brought, and is of itself no ground for invoking the aid of a court of equity; and can not avail to eke out other equally defective pretensions for equitable jurisdiction. He who has an adverse title or claim to land is entitled to have the same tried and passed upon by a jury of his countrymen.

The claim that plaintiff has merely an *equitable title*, while the legal title is in his grantor, is not sufficient to allow him to come into equity to settle his claim against *third parties*. In the *first* place, he could assert the legal title at law *in the name of his cestui*. And *secondly*, he must have some equity or equitable right *against the adverse claimant*—the simple outstanding of the legal title, cannot deprive the *third party* of his right to have the case tried at law.

Stewart vs. Coulton, 4 *Rand*, *Va.*, 74.

Lange vs. Jones, 5 *Leigh*, *Va.*, 192, 195.

Williamson vs. Russell, 18 *W. Va.*, 623.

It is also true that the bill pretends that the defendants

interested in the land in controversy are numerous, and that he may be thereby subjected to a multitude of suits. But this pretension is inconsistent with the bill, and is disproved by exhibit No. 4, filed with it, which shows that John McConnihay, sr., the original owner of the land, conveyed it to the defendant, James D. McConnihay, in trust for certain of his children in October, 1875. The plaintiff therefore could only have been sued at law, by the defendant trustee, *James D. McConnihay*, in the legal title was, and is, and not by the *beneficiaries*, or any of them, whose equities would be concluded by judgment in ejectment for or against their trustee. The bill therefore, shows on its face no grounds for equity jurisdiction; but on the contrary, a simple assertion of legal right by the defendants to the land claimed by the plaintiff, for which the plaintiff had plain, ample and complete remedy at law by action of ejectment. It further appears from the bill that *Wright* purchased at *judicial sale*, and had not paid for the land, and was not entitled to a deed. The property was still under the control of the Court, and no suit could be maintained involving it without leave of Court; and in no event without impleading *Cram* who still held the legal title.

For these reasons the demurrer should have been sustained, instead of overruled, as it was by the court below. And this error is sufficient to reverse the decree appealed from.

As to the second ground of error.

The bill should have been dismissed because the defendants showed good title in themselves to the land in controversy.

Plaintiff and defendants each claim title under *John McConihay, Sr.* The plaintiff by virtue of the condemnation proceedings referred to—the defendants by reason of the reversion of the condemned lands to *McConihay*, and his deed of Oct. 31, 1875, to them.

Did these lands revert on the abandonment of this railroad?

The right of *eminent domain* is a right of *sovereignty*, be-

longing to the State alone. Under the constitution it may be exercised, or delegated to others, *only* for the *public good*. No right of condemnation can be exercised by a corporation, broader, or different, or *at all*, than as strictly conferred on it by the State, in its charter. Looking to the charter of the *Winifred Co.* for its powers and limitations in this regard, we find no right given to condemn lands for *mines* or *manufactories*. But for the purpose of transporting its products to market it is granted power to construct slack water navigation.

"And also to construct such *railroad* or *railroads* from any point on their said lands to the Great Kanawha river, or any other navigable stream, in the valley of the Kanawha river, and its branches, or to connect with any other railroad, or improvement which is now or may hereafter be authorized by the State of Virginia in the said valley of the Kanawha and its branches; *and to enable the said Company to carry out the provisions in this section contained they are hereby invested with all the rights, powers, and privileges, and subjected to all the limitations and restrictions contained in an act entitled 'An act prescribing certain general regulations for the incorporation of railroad companies,' passed March the eleventh, eighteen hundred and thirty-seven*, so far as the same are applicable to, and not inconsistent with the provisions of this act." (§ 3, Act of Incorporation.)

The act of incorporation, and the act of 1837 therein referred to, form the charter of the Company. Section 1 of the act of 1837 also provides, that that act shall be a part of the charter of every railroad authorized by the General Assembly, viz:

> § 1. *Be it enacted by the General Assembly*, That whenever it shall be deemed necessary by the General Assembly to grant a charter for the incorporation of a company to construct a railroad the following general provisions shall be deemed and taken to be a *part of the said charter or act of incorporation, to the same effect as if the same were expressly re-enacted in reference to any such charter or act*, except so far as such charter or act may otherwise expressly provide. (§ 1 of above Act of 1837.)

By this reference in its charter to the Act of March 11, 1837, and not otherwise, the *Winifrede M. & M. Co.* acquired

the right to condemn the lands of private persons for its railroad. It was limited in the exercise of this right of eminent domain, to the manner prescribed by that Act, and could only acquire *such title* or *interest* in the lands taken, as that act authorized to be acquired, and subject to all restrictions and limitations therein imposed. Recognizing this, the *Winifrede M. & M. Co.*, in 1853, condemned the land in controversy under the Act of 1837, as is shown by reference to the proceedings, and especially by the return made by the Commissioners appointed to assess the damages resulting from the condemnation. (Rec. p. 29 and 48.)

Under the Act of March 11, 1837, the *Winifrede M. & M. Co.* only acquired the right to condemn a right of way or easement for its railroad in the lands over which it passed, subject to be defeated at any time by their abandonment of the road; in which case it passed to the State and in event of *non user* by the state reverted to the grantors or former owners. (§ 20.)

This act, after conferring, in sections 11 and 12, the power upon such companies to condemn private property for railroad purposes; providing the manner of proceeding, the assessment of damages, and the judgment to be given therefor, concludes:

"§ 12. * * * * And when such judgment shall be satisfied by payment of the money into court or otherwise, the title of the land for which said damages were assessed shall be vested in the company, in the same manner as if the proprietor had sold and conveyed it to them."

And—

"§ 20. * * * * And in case the company at any time after the said road is completed, shall abandon the same, or cease to use and keep it in proper repair, so that it shall fail to afford the intended accommodation to the public, for *three successive years*, then, and in that case, also, their charter shall be annulled as to the company, and the State of Virginia may take possession of the said railroad and works, and the title thereto shall be vested in the said State so long as it shall main-

tain the same in the state and manner required by said charter; *otherwise the lands over which the said road shall pass, shall revert to and be vested in the person or persons from whom they were taken, by concession or inquisition, as aforesaid, or their heirs or assignees.*"

It is clear that these provisions were intended to vest in the railroad company a right to the use of the land so long as it was operated for railroad purposes, *first*, by itself; *second*, on its failure, by the State; but *always* subject to the rights of *reversion*, left to the former owner, when the public use ceased.

The *letter* of the act conforms strictly to the *spirit* of the Constitution—the right to take and hold private property, against the owner's consent, is restricted to the *public use*—when the public use ceases the *right* ceases.

§ 22 makes the railroad a *public highway*, and the company a public servant bound to carry all who apply. This feature of the corporation was *essential* to enable the Legislature to confer the right to condemn; without it the grant would be unconstitutional. Consistent with this view the railroad company was made a public servant, required to open its line to the public, and to *continue to operate its road*, as a condition to its franchise, and to its right to hold and enjoy the property of private citizens against their consent. Its *continued existence* and *public service*, is the tendon by which it holds the right, and on an abandonment of its road all the rights thus held are forfeited, and the State, where the public good requires it, or it is important that a work of internal improvement should not fail through lack of prosecution, might take and retain possession of the land condemned, and road, *so long as it maintains the latter* for the public use. But, in event the State refuse or fail to operate the road, as in the case at bar, its right, to use the private property of its citizens, also ceased. The right to use the way was conditioned on the *use*, and could not survive it.

In the case at bar, the power to condemn was dependent on the *purpose* for which the land was to be taken, namely,

the operation of the railroad for the public convenience. Nothing is better established than the law of the similar case of the *conveyance* of property for particular uses, as for parks, streets, &c., and the reversion of the land to the grantor when such use has been abandoned.

If any difference could be conceived between the two cases, the statute has eliminated it declaring that title shall pass by the condemation as if the property had been "*conveyed.*" (§ 12, Acts 1837.)

Condemnation being an encroachment on the right of property, the power is carefully restricted by the Constitution of the United States and of the State; and the statute should be construed strictly against the right. (See p. *infra* for authorities); a corporation must show a clear right, before it can proceed at all. And under the act of 1837 and under the general law, could acquire no greater estate than was necessary to enable it to properly discharge its duties to the public; and the land owner retain all rights except those which necessarily conflicted with the exercise of the franchise of the company.

2 *Wood's Railroad Law*, note.

Kansas Central R. Co. v. *Allen*, 22 Kan. 285.

Chapin v. *Sullivan R. Co.*, 29 N. Y. 564.

Henry v. *Dubuque, &c. R. Co.*, 2 Iowa 288.

Aldrich v. *Drury*, 8 R. I. 554.

In pursuance of this well established principle, it is settled by the weight of authority in this country, that even when *no* provision is made, as to the estate granted to a railroad company in the conveyance or condemnation for its railway, or any provision, as to the reverting of the land on failure of the company to use the same for railroad purposes, no more than an easement being *necessary* to the road, the *law* will annex to a deed, absolute on its face, the *condition* that it be used for the purposes contemplated, and that on the cessation of such use the land shall revest in the original owner, with the right to re enter and take possession. This has al

ways been the case with highways, (*Barclay et als.* v. *Howell's Lessees*, 6 Pet. 498), and applies to railroads as well.

Mr. Woods on his able Work on Railroads (1885) says:

"As to railroad companies, it is generally held in this country, that the land taken for their use in the construction of railroads, they do not *in the absence of an express provision* to that effect in the charter, take the fee but only the easement therein, the fee remaining in the owner, and reverting to the owner, and reverting to him when the use thereof for such purposes ceases." (p. 767.)

See also:

Blake v. *Rich*, 34 N. Y. 285.

Head v. *Brooklyn*, 60 N. Y. 242.

Albany, &c., R. R. Co., v. *Brownell*, 24 N. Y. 345.

Eaton v. *Boston C. & M. R. Co.*, 51 N. Y. 565.

Western Penn. R. Co. v. *Johnston*, 59 Penn St. 290.

Alabama, &c., R. Co. v. *Burkett*, 42 Ala. 83.

Louisville & Nashville R. Co. v. *Carrington*, Bush. (Ky.) 326

Troy & Boston R.Co. v. *Potter*, 42 Vt. 174.

Morris v. *Schallsville, &c.*, 6 Bush. (Ky.)

Proprietors of Lock v. *Nashua & Lowell R. Co.*, 104 Mass. 1.

Beach v. *Miller*, 51 Ill. 206.

Taylor v. *N. Y. R. Co.*, 39 N. J. Eq. 28.

Barlow v. *McKinley*, 24 Iowa 69.

State v. *Brown*, 27 N. J. L. 13.

Hastings & B. & B. R., 38 Iowa 316.

This being the law, *without* the act, a right of reversion in the lands condemned would have existed in the original owner, had this statute of 1837 gone no further than section 12, which passed title to the *company*, as if the land taken, had been conveyed to it.

The Assembly, however, seeking to hedge around with safeguards and limitations, a right of the highest prerogative

kind in granting it to a corporation; and to confer only the right to take and use private property to an extent strictly necessary to carry out the object of its incorporation, and as would result to the public good, expressed this right of reversion in the act itself, and cut down the period of *twenty years*, after which an abandonment might be presumed at common law, to *three years* as the limit of the *non user*, leaving no room for doubt or cavil. To the grant of the right to condemn, is expressly annexed in section 20, the condition that the land shall revert when abandoned or not used, by the company, and *three years* grace is made the limit of indulgence.

Under the Act of 1837 nothing more than an easement *was condemned, or paid for.*

A railroad being a public highway; from its nature, was in many cases an advantage to the owners of the land condemed, and greatly enhanced and contributed to the value of the residue of the land, while it was operated.

These benefits, to be derived from the construction of the road were by the Act, made part of the compensation, and the commissioners for assessing damages were required to, and did deduct their value from the amount of damages otherwise due the owner. These advantages ceasing with the abandonment of the road, left the owner, unless the land reverted to him, deprived of both land and compensation.

§ 10 of the Act provided that the Commissioners appointed to assess the damages to be paid for the land, should consider and deduct the value of the advantages which the owner of the land would derive from the construction of the road. It will be observed also, they were to assess the damages for the "use" of the land, by the company; no compensation being provided for the *fee* or *reversion* remaining in the owner.

How important a part these "advantages" played in the proceedings under consideration, can be estimated when the character of the "residue" of *M'Caskey's* lands are considered—a large body of coal and timber lands, extending for miles along the line of the proposed railroad—immensely

valuable with a railroad to market their products—but comparatively worthless without a highway to market.

That these advantages *did* receive consideration, is shown by the award of the Commissioners.

"We, Joel Ruffun, Abel P. Sinnett, George H. Warth, and Samuel Hannah, freeholders appointed by an order of the county court of Kanawha county for the purpose of ascertaining the damages which would be sustained by John McConihay, the proprietor of certain land in said county which the Winifrede Mining & Manufacturing Company propose to condemn for their use—the same proposed to be condemned is more particularly described in the specification and statement of John R. Garland, the vice president and agent of said company, and the plat of Abel P. Sinnett, each of which is herewith returned as part of this report, marked A & B—do hereby certify that we met together on the land aforesaid on the 15th day of July, 1853, the day appointed therefor by by said order, and having been first duly sworn, and having reviewed the premises aforesaid and not being able to complete the duties assigned us on that day, by consent of parties, we adjourned to meet at the lower company store, in the Kanawha Salines, on Wednesday, the 20th inst., and having met pursuant to adjournment, and the parties and the counsel being present, we proceeded to estimate the quantity and quality of the land aforesaid, the quantity of additional fencing which would probably be occasioned by its condemnation, and all other inconveniences which seemed to us likely to result therefrom to the proprietor of said land; that we combined with these considerations as far as we could *a just regard to the advantages which would be derived by the proprietor of said land from the construction of the railroad for the Use of which said land is to be condemned; that under the influence of these considerations* we have estimated and do hereby the assess the damages aforesaid at the sum of two thousand seven hundred and fifty dollars.

"Given under our hands and seals this 20th day of July, 1853.

"JOEL RUFFUN. [SEAL.]
"ABEL P. SINNETT. [SEAL.]
"G. H. WARTH. [SEAL.]
"SAMUEL HANNA." [SEAL.]

When the Commissioners, in assessing the value of the land considered the directions given them in § 10, to assess the damages sustained for the *use* of the land, by the company, and when they further considered the *reversion* provided for in § 29, upon three years abandonment of the land condemned, they were bound to, and did, recognize a vested right, still remaining in the owner, which was not condemned, and for which, no compensation was allowed. An easement or *use* of the property alone, was authorized to be taken, and was alone actually considered or paid for.

The reversion, *not condemned*, was as much a right of property as the *easement*, that *was*. It was a vested right in the owner, to have back his lands when the road should cease to afford those advantages to the public and himself, in consideration of which, his rights had been invaded, and property appropriated against his will.

Such a restriction or reversionary interest is always considered and allowed for, in assessing the measure of damage.

Heard v. *Brooklyn*, 60 N. Y. 242.

Alabama R. R. Co. v. *Burkett*, 42 Ala. 83.

Mills on Eminent Domain, sec. 57.

This reversionary interest, being *private property*, could not be taken without an assessment of damages therefor, and payment to the owner.

(Const. Va., Art. 3, sec. 2.)

Heard v. *Brooklyn*, *supra*.

Even *subsequent* acts of the Legislature, expressly or impliedly divesting this right of the owner, and vesting it in the Company without providing *additional* compensation, would be unconstitutional and inoperative.

What were the benefits, and their probable value, the amount of which the commissioners were required to and did deduct from the amount due *McConihay*? By §22 (act 1867) every railroad constructed under this act was given the exclusive right of transportation, and made a public highway and common carrier, and required to keep the necessary car-

riages and means for transporting all persons and property which should be offered; and upon the payment or tender of fares, required to make such transportation, under heavy penalties.

Though private enterprise might obtain the charter for private ends, and construct and equip the road for its own purposes, the public must share in the benefit; be carried and accommodated. This is the corelative duty that follows the exercise of the right of eminent domain.

The advantages of a railroad to the property owners along its line need not be enumerated—only the peculiar advantages in this case, to *McConihay*, which influenced the award of the Commissioners.

The lands of the *Winifrede M. & M. Co.*, the terminus of the proposed railroad, were more than four miles from the river. Between them and the river, and along both sides of the proposed road, lay the "wild" lands of *McConihay*, heavily timbered, and prospectively valuable for its great coal deposits, but at that time, practically cut off from market, for want of facilities for transporting these products.

The construction of this railroad through the lands of *McConihay*, provided the needed outlet to his coal and timber—was a great and peculiar benefit to him, and largely enhanced the value of the residue of the land, not condemned, by placing the timber and coal along the line of the proposed road, in direct communication with the market. In fact, almost the same advantages were offered *McConihay* in opening and developing the back portion of his large tract, that would accrue to the Winifrede M. & M. Co.

These facts could not escape any intelligent body of freeholders sent to adjust the amount of damages, with the injunction to take into consideration the *advantages to be derived from the road*.

To consider these great advantages, and deduct them from the damages occasioned by the taking of the land, may be equitable enough so long as they are guaranteed, and realized by the owner, from the operation of the road. But to allow

a mining and manufacturing company to take property, and in part, pay for it by the benefits, conferred upon the owner of the land, by the operation of the railroad, and then to permit the company to keep the land but abandon its road, and utterly refuse to perform the duties imposed on it, or to afford the advantage, which was part of the price of the land, is not only inequitable and unjust, but is clearly in the face of the cherished clause of the Constitution, which provides

"That private property shall not be taken for public use without *just* compensation." (Va. Const. Art. III, sec. 2.)

The Act of 1887 expressly provides against such an unfair result, by making the abandonment, the occasion of a reversion of the land, to the former owner.

The *actual* value, of the land *actually* taken, which was required, by the Act to be paid, is far from a just compensation for the damage occasioned to the property as a whole. The case at bar is a striking illustration—where the land actually taken, furnished the only practicable outlet to McConihay's coal and timber lands on Fields' creek; and the acre and a half of bottom land, the whole available river front, of the McConihay coal property worth at least $200,000, very valuable for its location and indispensable to the profitable shipment of coal and timber from the residue of the property. (See answer of defendants, Rec. p. 40.)

Whatever may have been the actual value of this scrap of land in the market, severed from the coal lands, it was of much greater value to *McConihay* in connection with his coal property, especially in view of the character of the river shores both above and below.

In operating coal properties on the Great Kanawha river, where the mountains begin almost at the river's edge, every foot of bottom land, is of the greatest value for the location of buildings, in connection with the mines; and especially so is the river front, for the erection of tipples, the lolging and loading of barges, and purposes of river transportation. The actual value of the land, actually taken from McConihay would by no means fulfill the constitutional requirement of

a *just* compensation, without in addition, the value of the advantages that would flow from the operation of the road, as a public servant; the benefits of which were made part payment for the land.

In 1868 or 1869 the railroad, over the land taken from McConihay, was totally abandoned, and the rails were taken away and sold; and in 1870, the last of the rolling-stock of the *Company* was disposed of, under order of court. The railroad ties and depot, soon rotted away and disappeared, and in this condition the road remained, and was, at the institution of this suit in 1881. (See Rec. 79, deps. of Swann, Ans. 1 & 2, and of others.)

At the expiration of three years from the said abandonment in 1869, the State of *West Virginia*, who had succeeded to the rights of the State of Virginia, might have annulled the charter of the company, and continued to operate the railroad. This it failed to do, and the land, by virtue of the statute and by general law, reverted to and revested in the former owner, *John McConihay, sr.*, and by his deed of October, 1875, passed to, and vested in, the appellant, James D. McConihay, trustee, for the uses and purposes set out in said deed.

To meet these views, it was urged by appellee in the lower court:

That the *W. M. & M. Co.* being a private enterprise, incorporated for the purpose of mining and manufacturing alone, the grant of the right, to build a railroad and condemn land therefor, was intended to subserve private ends only, and only be taken in connection, with the private purpose for which the company was declared to be formed, viz: "mining and manufacturing;" and that it could by no means have been intended that they should operate a *public* road for the transportation of freight and passengers. No position could be more untenable than this. The authority of the company to construct and operate its railroad is coupled with the provision, that it shall be subject

to all the *limitations* and *restrictions* contained in the act of 1837; that act, as we have seen, expressly provides without exception, that as a consideration for the franchise, every company, operating a railroad, shall be a public carrier and at all times prepared to serve the general public, (§ 22); and that a failure in this regard, to afford the necessary accommodation to the public, shall forfeit its charter; and the "rights of way," whether acquired by grant or condemnation, shall revert. (§ 20.)

No such thing as a "private railroad" is known or authorized in the statute. Whatever the name, or whatever the other powers conferred, by the act of 1837, and § 3 of its charter, the company was authorized to exercise the rights of a railroad company, upon its assuming the duties and responsibilities, imposed upon such companies, by the act of 1837. This company could not assert the rights and enjoy these advantages of a *railroad company*, and at the same time repudiate its burdens; enjoy "all the rights, powers and privileges" conferred by the Act of 1837, and escape all the "limitations and restrictions," imposed thereby.

If the company's proposed road was to be a private railroad, it is hard to conceive the "advantages" to the owner of the land, required by the statute, to be deducted, and in fact, deducted, in this case by the commissioners, from the compensation due the land owner, for the injury resulting from cutting through his lands.

If we could find a solution to these inquiries, it might still trouble us, to show how the property of citizens could be taken for *private* purposes, under the Constitution. See *Salt Co. v. Brown*, 7 W. Va. 198.

In the case of *Varner v. Martin*, 25 W. Va., p. 556. The Court says:

"1. The general public, must have a definite and fixed use of the property to be condemned; a use independent of the will of the private person, or private corporation in whom the title of the property, when condemned, will be vested; a public use, which cannot be defeated by such private owner; but which public use continues to be guarded and controlled by

the general public through laws passed by the Legislature.

"2. The public use must be clearly a needful one for the public, which cannot be given up, without obvious loss and inconvenience.

"3. It must be impossible or very difficult, at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property."

"If *any* of these essentials are wanting the Court will declare the act of the Legislature, authorizing such condemnation of private property, to be unconstitutional, because it would amount to taking private, property for *private*, and not public, uses.

* * "Upon these principles the Legislature could not authorize land to be condemned for the erection of dams, &c., or *manufactories*, generally, because they want the first qualification.—The general public have no definite and fixed use in any such mills and manufactories. They have no uses of them, which are independent of the will of the owner; for the Legislature have never required saw mills or manufactories generally, to do work for any one, except those for whom they choose. This is held in Maine, New York, Michigan and Vermont. * * * It would seem, therefore, to be clear that the Legislature, cannot authorize the condemnation of lands in any case, no matter how urgent, for the establishment of a *private* road, &c. The views here expressed are in accordance with the views on this subject, which have been expressed by the Court of Appeals of Virginia and West Virginia." (*Varner v. Martin*, p. 556 and *seq.*)

We submit, therefore, that the public character of the road, was the price at which the right of eminent domain, was conferred upon the W. M. & M. Co., and it must conform to, and be governed strictly by, the Act of 1837.

But whether the road be public, or *private*, is immaterial. The *character* of the road, can not change the *character* of the estate, passed by condemnation; or free the grant from the right of reversion to the owner, on its abandonment.

It was also urged in the court below—

First, That the condemnation, being commenced in 1853, subsequent to the passage of the code of 1849 providing for condemnations in fee simple—the proceedings *might have been* instituted under that act, and a fee simple estate acquired.

Second. That the code of 1849, repealed the act of 1837, and the provisions of the *code*, should govern as to the rights of the parties in this case.

In answer to the *first*; it is immaterial what "*might have been*"—the condemnation was *not* under the code—but was under the act of 1837. But we submit that the act of incorporation, passed *subsequent* to the adoption of the code—by conferring upon the *company* 'the rights and powers,' and imposing the 'duties and restrictions,' set out in the act of 1837, thereby, as to this company, revived the act of 1837, as fully as if each of its sections had been set out in words, in the charter. And this subsequent special act, withdrew this company, from the operation and effect of the prior general act in the code.

The company could have no rights whatever outside of the act of 1837, to condemn: and if the proceedings *had been* under the code, having no right to proceed thereunder, no title could have passed by the proceedings, or if any, certainly no *greater* estate, than authorized by its charter to be taken.

The Code was passed August, 1849; by its terms, to take effect July 1, 1850. The *special act* incorporating the W. M. & M. Co. was passed February 16, 1850, taking effect on its passage. Had the Code of 1849 gone into effect *at* its passage, in August, 1849, undoubtedly the special act of February, 1850, incorporating the W. M. & M. Co., and requiring its condemnation to be according to the act of 1837; must have repealed the Code, as regards *that company*, so far as it was inconsistent with the charter, and re-enacted for the purposes of that company, the act of 1837, which was made by the act of incorporation, and by the first section of the act of 1837, also, a part of its charter.

The Act of incorporation being both a *special* act and *later in date* than the Code, must govern.

See:

***State v. Stolle*, 7 *Wal.*, 425.**

Powers v. Barney, 5 *Blatch., C. C.*, 202.
Maddox v. Graham, 2 *Metc.*, (*Ky.*) 56.
Edgar v. Greer, 8 *Clark*, (*Ia.*) 394.
Tierney v. Dodge, 9 *Minn.*, 166.
Woods v. Wellington, 30 *N. Y.* 218.
Korah v. Ottawa, 32 *Ill.* 121.
Peerpont v. Crouch, 10 *Cal.*, 315.
Burke v. Jeffries, 20 *Ia.*, 145.
Crane v. Reeder, 22 *Mich.*, 322.
Sedgwick on Construction of Statutes, p. 99 *and* 100 *n.*

Even where two acts are passed on the same day, one *general* the other *special*, or two parts of the same act are inconsistent, the special must prevail over the general.

Felt v. Felt, 19 *Wis.*, 163.
Mead v. Bozzal, 15 *Wis.*, 166.

The particular privileges and franchises, to be granted to a corporation, least of all things, could be provided for and governed by one general law; but must be made the subject of special legislation. The Legislature must decide what provisions, rights and restrictions, are proper, to be granted to, and to govern a particular corporation, in incorporating it.

One Legislature cannot bind or fetter subsequent ones, in the passage of laws. A provision that no charter shall be hereafter granted that is not subject to amendment, may be set aside at any time. (*N. J. v. Yard*, 95 U. S., 104.)

The provision in § 1, ch. 61, Code 1849, that all companies governed by the Act of March 11, 1837, or which shall hereafter be created, shall be governed by "this, and the 56th chapter of this Code, when not in violation of its charter," could impose no binding restriction on the General Assembly that *after*, not to repeal the Code, *in toto;* or to pass such acts of incorporation, subject to such different provisions, and governed by such different laws, as it saw fit; or did it attempt to do so, § 34 of chapter 61, itself providing that it might be amended at any time, as to companies governed by it. It was perfect-

ly legitimate in the Assembly, to pass an act and enter into a contract, with the *Winifrede Mining and Manufacturing Company*, that it should be governed by, and subject to, the restrictions of the act of March 11, 1837, notwithstanding the general law of 1849.

It was in effect, a re-enactment of the act of 1837, for the purposes of the *Winifrede Co.*, and a repeal of the act of 1849, so far as inconsistent with it. Could the Assembly have intended that the law of 1849 should govern when it provides that of 1837 shall? The language of the act is the best index of intention when free from ambiguity. By the act of incorporation, the W. M. & M. Co. was only granted the privilege of building a railroad and condemning land *under the provisions of the Act of 1837*, and not otherwise; nothing is said of any right under the law of 1849, though then just passed. The powers of a corporation are strictly confined to the provisions of their charters; and we submit that if the Act of 1837 was not continued for this corporation, by its charter, the company had no right, to condemn land, or operate a railroad at all. The fact that the Code of 1849 was not to take effect until July 1, 1850, *after* the incorporation of the company, can make no difference, conflicting acts must govern according to the days of their passage. The Act of 1849 was passed August, 1849, the fact, that it was not to go into effect until July 1, 1850, could not take away the right of intervening Legislatures, to repeal or modify it; or meanwhile confer powers and impose restrictions upon special corporations, inconsistent with it. In such case, to the extent of the repeal, or modification, the Code would never go into effect.

It was competent for the Assembly to repeal the whole Code, the day after its passage, without awaiting the day fixed for it to take effect. So it did repeal, by the act incorporating the *Winifrede M. & M. Co.*, so much of the "general railroad law" in the Code, as conflicted with act of 1837.

The date of the law is that of its *passage*; otherwise, one Legislature, by postponing the time at which any statute

is to go into effect, could tie the hands of subsequent Legislatures, and occasion endless confusion and mischief.

But it is urged, that the Act of 1837 was expressly repealed by the Code of 1849. We answer that before the repeal went into effect, it was, as to *the Winifrede M. & M. Company*, re-enacted by the subsequent act of 1850, incorporating the company.

It is true, the repeal was to take effect July 1, 1850, but it will hardly be contended that all the acts (1850) passed, between the passage of the Code and its taking effect, and inconsistent with the Code, became nullities and stood repealed by it, after July 1, 1850.

Could such a construction be seriously entertained, the general repealing clause of the Code 1849 itself, would settle the question.

The Code 1849, ch. 216, sec. 1, is as follows:

> "§ 1. All the provisions of the preceding chapter shall be in force upon and after the 1st day of July next; and all acts and parts of acts of a general nature, *in force at the time of passing this act*, shall be repealed from and after the 1st day of July next," &c.

This repeals no *special* acts, and expressly excepts *all* acts subsequent to August, 1849, from its effects. We, therefore, submit that the act governing and controlling the rights of the parties to this suit, is act of 1837 alone, under which the condemnation was actually had.

If not, what effect had the act of 1849 on the case? and how did it alter or modify the provisions of the act of 1837, under which the condemnation was had.

Chapter 61 of the Code of 1849 provides for works of internal improvement; sec. 1, provides:

> § 1. "Every company governed by the act passed October 7, 1837, or by the act passed March 11, 1837, &c., * * and every company which after the *commencement* of this act, shall be incorporated, &c., * * shall be governed by the provisions contained in the 57th chapter, and in this chapter, so far as the same shall apply to such company without violating its charter."

The charter of the *Winifrede M. & M. Company*, providing that that *company* shall be *governed by and entitled to the provision of the act of 1837*, would be clearly violated by making it amenable to this chapter. Therefore, the prior, general act of 1849, must yield to the subsequent special act of 1850 incorporating the act of 1837 as part of the company's charter.

But, even conceding that ch. 61 of the Code of 1849 applies; by its terms chapters *57* and *61*, *govern neither relate to the condemnation of lands*. Chapter 57 relates solely to the organization of joint stock companies, and has no provisions bearing on this case. Chapter 61 solely the organization and operation of internal improvement companies generally. Of the latter, the first thirty sections relate chiefly to the collections of tolls, with a provision that the company may erect telegraph lines, borrow money, &c.

§ 31, as to the power of the State over corporations, provides—

> "§ 31. * * If the works of any company be not commenced, &c., * * or if completed, be abandoned three successive years, &c., the State may proceed by *quo warranto*, *or* take possession of the works and property of such company, and in case of so taking possession, shall keep the same in good repair, and have all the rights and privileges previously vested in the company. But the State shall pay the company for such works and property the value of the same at the time it takes possession thereof."

This is all of chapter 61, bearing upon the subject in hand, and which it is declared, shall govern; nothing is found in it relating to the right of condemnation, or the title thereby vested; that subject is specifically treated in another chapter (56), and is not mentioned in section 1 of chapter 61, before mentioned. In that section, it is in terms provided that charters thereafter granted shall be subject to chapter 57—on joint stock companies; and chapter 61—on internal improvements. No mention is made of the chapter on condemnation of lands. The implication is fair that the latter chapter

would or would not, control a company incorporated by special act—as the *special act* might provide. *Expressio unius exclusio alterius.*

The Code was not intended to, and did not, affect the rights then or thereafter, vested by condemnation, under different proceedings than those provided for in chapter 56.

Nor did section 31, chapter 61, which provides for the general disposition of the property of "internal improvement companies," destroy or alter rights of property determined by condemnation proceedings, had under *other* acts.

The right of reversion, as left in the grantor by a condemnation under the act of 1837, was certainly a "right of property" as much so as any remainder or reversionary interest at Common Law; and could no more be taken from the individual, and disposed of by the State in this way, than his other property. Had the statute attempted to do so, it would have been unconstitutional and inoperative. But such an intention can only be arrived at, by a forced and unreasonable construction.

The Code was enacted as one consistent law; having by a general provision (ch. 56) provided a condemnation in fee. In section 31, chapter 61, it reserves to the State the power, in event of an abandonment of the work by the company, to operate any of its works of internal improvement, upon paying the value thereof. No reservation is made as to any reverter to the original owner, because by chapter 56 the land is declared to vest absolutely in fee simple in the company. All cases of *reversion* under *other acts*, were left to be governed by the special provisions of those acts.

While it was not declared by the Code that any right of reversion should be taken away or altered, a provision *protecting* them was not inserted, because reversions were not contemplated by the general law enacted in the Code, and it was not, as to condemations, intended to affect corporations exercising *special* powers, conferred before it took effect.

So much for the *construction and effect of* the statutes.

The plaintiff, Wright, evidently feeling the weakness of his case upon the statute, next made a feeble attempt to bolster up his title, by a claim of *adversary possession*, but abandoned it the hearing.

Such a position is untenable—the company held *under* McConihay and not adversely to him. The company by the condemnation took an estate upon a condition *subsequent* namely, the continued operation of the road. After the happening of the condition it and its assignees were tenants, by sufferance, *under*, and not adverse, to McConihay's title. *2 Blackstone's Com.*, 150.

In a similar case, *Kirk* v. *Smith*, 9 Wheat. 288, Chief Justice Marshall speaking of the statute of limitations of Pennsylvania says:

"It must be governed by those rules which apply to acts of limitation generally.

One of those which has been recognized in the courts of England, and all others, where the rules established in those courts have been adopted is, that possession, to give title must be *adversary*, the word is not, indeed, to be found in the statutes, but the plainest dictates of common justice require that it should be implied. It would shock the sense of right which must be felt equally by legislators and judges, if a possession which was permissive and entirely consistent with the title of another, should silently bar that title. * * To allow a different construction would be to make the statute of limitations a statute for the encouragement of fraud—a statute to enable one man to steal the title of another by professing to hold under it. No law admits of such a construction."

See also:

Zeller v. *Eckart*, 4 How. 289.

Emeric v. *Tavenez*, 9 Gratt. 220.

Twyman v. *Hawley*, 24 Gratt. 515.

Hudson v. *Putney*, 14 W. Va. 576.

But, even if the statute applied in such cases, the proofs show that neither the period of the statute had run, nor was the plaintiff, Wright, or his vendors in possession of the lands in controversy, except a small parcel in one corner held by a

tenant under a lease limiting the possession to his enclosure. (Dep. Diddle R. 75, 9th ans.)

The proofs show that the road was abandoned in 1868 or '69, and rolling stock sold in 1871. The three years mentioned in the statute, did not elapse to 1872. The State then had its right to elect to operate the road; and upon its failure to elect within a reasonable time, the lands deverted to McConihay. In no event did a right of action accrue to McConihay until the State failed for a reasonable time to operate the road. The State's right accrued 1872; and McConihay's right to enter accrued subsequent to that date; and both dates are within ten years next preceding the institution of this suit.

It further appears from the evidence that no part of the "right of way" lying *south* of the C. & O. R., was enclosed, but on the contrary it lay open in commons, from and after the date of the abandonment of the road and removal of the rails; and was in no wise in the possession of *Cram* or *Wright* after that date, (1869.) That that portion of the "way" between the C. & O. R. R. and the river, was in part under fence by Cram's tenant, and part ununder fence by McConihay. There was *no* possession of the way *south* of the C. & O. R. R., and *mixed* possession between it and the river (see map with Record.) All the statements of McConihay, sr., attempted to be shown in evidence, were prior to the forfeiture, and entirely consistent with his conditional right of revesion, then not accrued.

The court below, as will be seen, from its decree, ignored the claim of adverse possession, and decided the case purely upon the construction of the statutes involved.

The third ground of error.

The bill should have been dismissed upon the hearing, because the proofs showed the plaintiff had no title, legal or equitable, to the right of way in controversy.

The strip of land condemned was not mentioned in the bill

in the suit of *Bank of Virginia* v. *Winifrede M. & M. Company*, or sought to be subjected in that suit to the payment of the company's debts. It was not sold to Cram, nor conveyed, or mentioned in his deed.

In fact, the damages assessed for its condemnation in 1853, were not paid, if at all, until after the sale to Cram. The only pretense of payment being from the proceeds of that sale to Cram. By decree of Court in *Cram* v. *Bibby* in 1880, Cram attempted to acquire title to this property; but his attempt was abortive, and the title thereto if not in *appellants*, is still in the *Winifrede M. & M Company*, and not in Wright or his vendor.

In 1860, the *Bank of Virginia* and others, creditors of the *Winifrede M. & M. Co.* brought suit against the *Company*. The *bill* set out their several judgments, alleged that the *Winifrede M. & M. Company* was owner of 10,180 acres of land acquired from *G. T. Snow & als.*, particularly described in the deed from them, dated January, 1853; to which reference was had, and a copy filed with the bill; and prayed that this tract of land be sold for the payment of their debts. (See Bill Rec., p. 54, and Deed Rec., p. 49.) This deed described the 10,180 acre tract by metes and bounds, and does not include the land or "ways," acquired by condemnation from McConihay, not then paid for, and to which no title had yet been acquired. It may here be observed that no title passed by the condemnation until payment in full for the land condemned. Act of 1837–'38.

The *decree* entered upon the bill (Rec., p. 22), ordered a sale of "the 10,180 acre tract belonging to the Winifrede M. & M. Company, fully set out and described in the bill," and the improvements *thereon*. This no more includes the strip of land, four miles long, condemned from McConihay, than the bill.

The *report of sale* (Rec. p. 95) was that the commissioner has sold "the tract of 10,180 acres belonging to the *W. M. &*

M. Co., and fully set out in the papers in this cause," together with the improvements, &c., to *Henry Cram* for $80,000.00, October 26, 1865. The *decree confirming this sale* (Rec. p. 96) adjudges that the "Winifrede property of 10,000 acres of land," &c., made by commissioner *Swann* to *Henry A. Cram* be confirmed.

Under this decree the deed made by *Swann*, special commissioner, to *Cram*, June 25, 1870, after reciting the authority of the commissioner; the sale of the real estate thereafter mentioned; the fact that *Cram* was the purchaser, and entitled to a deed; proceeds, "Now therefore, this deed witnesseth that the said *T. B. Swann*, special commissioner, as aforesaid, has this this day granted and conveyed unto the said *Henry A. Cram* the following real estate, situated in the county of Kanawha, and State of West Virginia, and bounded and described as follows, to-wit: 10,180 acres of land lying on Field's creek, south side of Kanawha river, and Slaughter's creek, and extending to the bluffs of Coal river, as laid down upon the surveyor's map filed in the cause, and for many years the property of the Winifrede Mining and Manufacturing Company, as fully shown by their *deed* of record in the recorder's office for Kanawha county, W. Va., and bounded as follows, to-wit: Beginning, &c."

The metes and bounds following, are *verbatim* from the Snow deed referred to. Nothing else is conveyed or mentioned, than the 10,180 acre tract acquired of Snow, generally called the 10,000 acre tract.

It will be remembered that at the time of the institution of this suit, and at the time of the sale to Cram, the damiages due McConihay for the roadway had not been paid; it is claimed that they were paid out of the proceeds of this sale. Prior to this payment, no title whatever vested in the company. (Acts 29, § [illegible] 1849, ch. 56)

Balt. & Susquehanna R. R. Co. v. *Nesbit & Goodwin*, 10 *How.* 395.

Hence it was that the "ways" were not embraced by the bill, or sold by the Court. The bill expressly refers to the

10,000 acres from Snow, as the only land owned by the company; and sought relief against that alone.

All the proceedings were based on the bill; and what counsel may now say was *intended* to be included, cannot avail to set aside the plain statements of the bill, decrees, report and deed.

The "Snow" tract of 10,000 acres, *alone* was set out in the bill, or mentioned in any proceedings or decrees in the cause, and that alone was purchased by and conveyed to Cram.

In 1878 Cram filed his bill, alleging that his purchase of the 10,180 acre Winifrede tract was, in fact, in trust for himself and others; asking that the same be sold and the proceeds divided. After the suit had been pending several years, conceiving the idea of increasing the price of the land to be sold, by adding a valuable right of way connecting it with the C. & O. R. R., which had been constructed since his purchase, as well as with the Kanawha river, and give it a river front, in March, 1880, he filed an amended bill in the suit last mentioned, acknowledging that the roadway was not included in his deed, but charging that it was *intended* to have been; praying that the *W. M. & M. Co.* be made defendant, and "that the Court will *treat* the roadway as a part of the property and as embraced in said deed to complainant," and that "this Court will sell the property, including the roadbed, as an entirety."

The allegations of this bill were utterly false, as shown by the papers of the cause, through which he derived his title above referred to.

Simultaneously with the filing of this amended bill the attorney who filed it for *Cram*, appeared without process, and filed a pretended answer for the *W. M. & M. Co.*, (long since defunct and out of existence, confessing the amended bill of *Cram*, and that the road way was intended to be included in said deed, (Rec. 861). This paper or pretended answer was neither sealed by the Company, or signed by any of its officers, and as shown by the evidence, was never heard by any

officer or stock-holder. The Winifrede Company at the time of this pretended answer filed it by *Cram's* counsel, had been long since sold out, and had passed out of existence. *Cram's* attorney, who filed this bill and answer, in his deposition, says he does not know of any meeting of the Company being held since 1870; or that there have been any officers of the Company since that date. That his communications with the Company, had always been through "Mr. Ellingwood" alone; and he had not received a letter or communication from him, for many years.—(Swann's Dep. R. p.). The depositions were taken in 1882. The pretended awswer filed in 1881.

He expressly says in 1882, that he had had no communication with the W. & M. Company, or its officers, or with Ellingwood, *for many years*, and that he simply appeared by virtue of his old employment in 1860, as counsel for the Company, in the suit of the Bank of Va., against it. "He drew his inspiration" from Mr. Ellingwood at whose instance the suit was brought with intent "to sell the property and get it into the hands of fewer stockholders which was done. Ellingwood was interested in the purchase, (Rec. p. 81). It seems the *few* represented by *Cram*, were not averse to paying for the 10,180 acres, without mention of the right of way, but were not willing in selling to adopt the same rule.

The pretended answer of the *Company* to the amended bill shows on its face its source and purpose, and the proofs sustain this showing overwhelmingly. So apparent on the face of record was the fraud, that any purchaser exercising due caution, on investigating the proceeding under which they proposed to buy, was bound to know it, and that no title to the road-bed, could pass under the decrees in that cause.

By decree on this amended bill and pretended answer, the 10,180 acres, and the road bed, were ordered to be sold. *Wright*, the plaintiff, became the purchaser at the price of $120,000, of which he paid $——. We maintain that a fraud

was apparent on the face of the papers; that the *Winifrede* M. & M. Co. was never before the Court in that cause, and that no title to the road bed could possibly pass to the purchaser.

McConihay was no party to that suit, nor was the company; as we have shown in one or the other of them was the title to the land, the appellants in the case at bar are not estopped, to deny that any title to the "way," passed by said proceedings either to the said *Cram*, or to *Wright*, the purchaser of *Cram's* interest. The title thereto, if not in appellants, still remains in the W. M. & M. Co. for the benefit of its stockholders, including those who were "squeezed out" of the 10,180 acres bought in by Cram, and sold by him at an advance of $40,000.

We submit, therefore, that the plaintiff, *Wright*, has not shown good title in himself to the land in controversy, and therefore, is not entitled to maintain this suit.

The pretended disclaimers filed at the hearing of the cause at chambers in Parkersburg, in the absence of appellants counsel, purporting to be signed by McConihays and others, are entitled to no consideration by the Court. It will be observed that all the appellants had answered the bill, claiming title; that these pretended disclaimers were filed, not by the *parties*, but by the *plaintiff;* these papers certainly had no effect as *pleading* in the cause; and no evidence being offered of their genuineness, they cannot be treated as *proofs;* nor is there any evidence that they relate to the controversy at bar. On their face they refer to an entirely different suit.

SUMMARY.

I.

The demurrer should have been sustained because

1. The plaintiff had ample an complete remedy at law.

2. No leave of Court was had, though the bill shows that the property is yet in the control of the Court.

3. For want of proper parties. The bill is for the maintenance of a legal title, shown by it to be in in Cram, who is not before the Court.

II.

The bill should have been dismissed at the hearing. Because the defendant proved their title.

The act of 1837, provided a reversion to the former owner, upon an abandonment of the public use—th Code of 1849, provided that an estate in fee simple should pass by condemnation proceedings.

The special act of 1850, by which alone this company acquired the right to condemn land, ignored the Code of 1849 and granted the Company only the rights and powers specified in the prior act of 1837—subject to all the limitations and restrictions of that act.

This amounted to a re-enactment of the act of 1837 for the purposes of this company, and was as to, it a repeal of all inconsistent acts, including the act of 1849.

The fact that the Code of 1849, had not yet gone into effect is immaterial. It was liable to repeal from the date of its passage, and as to the Winifrede M. & M. Company, the act of February 16, 1850, did repeal it.

The right in the corporation to exercise the right of eminent domain was part of its franchise, and conditioned upon the discharge of the co-relative duties to the public.

The use of the lands thus taken, is no less a part pt the franchise held upon a like condition.

The Legislature could not confer upon private individuals the power to condemn lands, no more should corporations, that have acquired land by the exercise of this right under an alleged intention to construct and operate a railroad for the public use be permitted to abandon its purpose, and transfer the lands so taken to private individuals for private ends—by indications do that which the Legislature itself could not authorize.

By the act of 1837, the advantages anticipated from the op-

eration of road, were required to set off against the just compensation guaranteed by the Constitution; and in the case at bar the set off was applied. Any different act than that of 1837, providing for a reversion upon failure of the consideration would violate the Constitution of the State.

East Ala. R. v. *Doe*, 114 U. S. 440.

In the case of the *Bank of Virginia* v. *Winifrede M. & M. Company*, through which Cram claimed title, the bill, decree report of sale, decree of confirmation, and deed to Cram, each were restricted to the tract of land acquired by the deed from Snow *et als*; and that at the date of the suit and sale, the Winifrede M. & M. Company had no title to the way condemned, the same not having been paid for. Cram's scheme, developed into the suit of *Cram* v. *Bibby* by amended bill and pretended answer, gave the Court no jurisdiction of the "way" in controversy and the decree of sale therein was *coram non judice*, and the sale under it passed no title to the purchaser.

The decree complained of, confirms the decree entered in vacation, which is as follows:

> The Court is of opinion, that by the proceeding in the county court of Kanawha county, West Virginia, upon the petition of John McConihay, then living and now deceased, begun in the year 1853, and prosecuted from time to time in said court and other courts, against the Winifrede Mining and Manufacturing Company to ascertain certain damages against said company for certain lands of said McConihay, which said company proposed to condemn, being the same proceedings of which a copy is filed in this cause, marked "Proof F;" and the subsequent payment of the damages so ascertained, the Winifrede Mining and Manufacturing Company became vested with the fee-simple title to said lands, as the same are described and set out in said proceedings; and the said John McConihay (the petitioner, and the grantor all the defendants in this cause except John H. McConihay, and the ancestor of all the defendants, except the defendants named as "husbands") became divested of all title in the same; that by the sale referred to in the bill, made to

Henry A. Cram by Thomas B. Swann, special commissioner in the chancery cause of the President and Directors of the Bank of Virginia against the Winifrede Mining and Manufacturing Company and others, heretofore pending in the circuit court of Kanawha county, West Virginia, the title to said lands so acquired by said Winifrede Mining and Manufacturing Company passed to said Henry A. Cram; that by the sale, also stated in the bill, made to the plaintiff by Henry A. Cram, Thomas B. Swann, Isaac N. Smith and Thomas L. Broun, special commissioners in the chancery cause of Henry A. Cram v. E. A. Bibby, et al., now pending in this court, the title to said lands so acquired by Henry A. Cram passed to the plaintiff; that the title to these lands had never reverted to or vested in the said John McConihay (petitioner; grantor, and ancestor, as aforesaid) in his lifetime, or in any one claiming under him since his death, by reason of any non-user or abandonment, or default, or failure of any kind on the part of the said Winifrede Mining and Manufacturing Company or of any one claiming under it. It is therefore adjudged, ordered and decreed that as to all the questions presented in this cause, or arising out of the facts presented therein, the plaintiff's title to the lands afore, acquired as aforesaid, shall, as against the defendants, and as against any and each of them and all parties claiming under them, be forever quieted, settled, and established, and declared firm and valid; that the title of the defendants, and each of them, to the lands aforesaid, as set up and claimed in their answer in this cause, or as might be set up and claimed thereto from facts known to them and existing at the time and not asserted herein, be, and the same is hereby, declared to be of no effect and invalid; that the defendants, and each of them, are hereby perpetually enjoined and restrained from interfering with or hindering or obstructing the plaintiff, his agents or employees, in the use and enjoyment of the lands aforesaid, acquired as aforesaid, and from asserting any claim or right or ownership in any manner to said lands upon any of the grounds or or claims set up and asserted by them in their answer in this cause, or upon any grounds or facts or claim known to them and existing at this time which have not been asserted by them herein.

For the reasons assigned, it is respectfully submitted that

this decree should be reversed and the plaintiff's bill dismissed.

In addition to the authorities cited we respectfully refer to following cases as sustaining the case as claimed by the appellants:

The case of the Louisville & Nashville R. R. *v.* Covington, 2 *Bush* (Ky.) 326, was similar to the case at bar. One *Covington*, by deed to a railroad company, conveyed certain land, upon condition that the road should be completed in three years. This condition was performed. The *Louisville* and *Washington R. R. Company* having bought out the old railroad company, took up the track, abandoned the use of *part* of the land so conveyed; sold it to private individuals; but continued to use and operate a railroad upon the residue of the land. The heirs of Covington sued for the whole land conveyed, as well as that *used*, as that *abandoned*. The court held that though no condition was expressed in the deed; as to the use to be made of the land, the *law* imposed the condition that the property should be used for the purpose contemplated, and that upon abandonment of the use, it would revert to the former owners.

On the question of forfeiture the court said: "We do not regard this as a suit to vacate or repeal a charter, and therefore, not embraced in § ———, etc, civil code, etc; but it is a suit to reclaim the title forfeited by a non compliance with the conditions of the deed, and does not necessarily involve the forfeiture of the charter. A corporation may still exist and be entitled to all its charter privileges, yet it may forfeit its rights to some of its property, because of a non compliance with the condition of the conveyance."

The case of Strong and others *v.* City of Brooklyn, 68, N. Y., was an ejectment against the city to recover a strip of land 50 feet wide, part of its street. The Legislature in 1832 incorporated the *Brooklyn and Jamacia R. R. Co.* with authority to condemn land for railroad purposes on payment of damages.

In 1834 the land was duly condemned and paid for. By agreement April 10, 1855, a conveyance in fee was made of the land to the city for a street, and the railroad track was removed a few feet to the side, to a part of the street belonging to the city, and adjoining. This conveyance was ratified by the Legislature, and the city declared to hold the land in fee simple.

In 1855 the railroad company removed its tracks, as agreed, and the *city* entered upon the strip of land so abandoned by the railroad, paved, guttered and flagged it for a public street, and expended large sums of money thereon, erected lamp-posts, built sewers, etc. It was claimed the condemnation vested an absolute fee in the company and its grantees, without any reversion on the abandonment of the railroad.

The Court held that the plaintiffs should recover the street from the city, it having been abandoned for the use for which it was taken. Other cases to the same effect have already been cited.

That corporations are confined strictly to the powers and rights granted by their charters, and can have nothing not expressly given; is established by the following cases, and meets the claim of the plaintiff to a fee simple absolute, in the land in controversy:

Dartmouth College v. *Woodward*, 4 *Wheaton* 518.
Bank of Augusta v. *Earle*, 13 *Pet.* 587.
Beach v. *Fulton*, 3 *Wend.* 583.
People v. *Utica Ins. Co.*, 15 *Johns.* 357.
Le Coutleux v. *City of Buffalo*, 33 *N. Y.* 333.
N. Y. Fire Ins. Co. v. *Sturgis*, 2 *Com.* 675.
N. Y. Fire Ins. Co. v. *Ely*, 2 *Com.* 699.
C. & A. R. R. Co. v. *Remer*, 4 *Barb.* 130.
Mobile & O. R. R. Co. v. *Franks*, 41 *Miss.* 494.
Trustees v. *Peasley*, 15 *N. H.* 330.

Downing v. *Mt. Wash. R. R. Co.*, 40 *N. H.* 231.

Petersburg v. *Matyker*, 21 *Ill.* 205.

Fuller v. *Plainfield Acad. School*, 6 *Con.* 532.

Com. v. *Erie & M. E. R. R. Co.* 3 *Casey* 352,

State v. *Mayor*, 5 *Port.* 279.

White's Bk v. *Toledo Ins. Co.*, 12 *Ohio St.* 601.

R. R. Co. v. *Seely*, 45 *Mo.* 220.

Shaumut Bk v. *P. & M. R. R. Co.* 31 *Vt.* 491.

Penn. & Nav. Co. v. *Dandridge*, 8 *Gill & J.* 248.

Vandall v. *S. S. F. Dock Co.*, 40 *Cal.* 83.

Winter v. *Muscogee R. R. Co.*, 11 *Ga.* 438.

Whitman Min. Co. v. *Baker*, 3 *Nev.* 386.

Ruggles v. *Collier*, 43 *Mo.* 353.

Rochester Ins. Co. v. *Martin*, 13 Minn. 19.

Occum Co. v. *Sprague Mfg. Co.*, 34 Conn. 541.

City Council of Montgomery v. *Plank Road Company*, 31 Ala. 76.

Dublin Corp v. *Attorney General*, 9 Bligh (N. S.) 395.

Maddox v. *Graham*, 2 Met. 72.

East Anglian Ry Co. v. *Eastern Co's Ry. Co.*, 11 C. B. 775.

Legget v. *N. J. Mfg Co.*, 1 Saxton's Ch'y 541.

Peahle v. *Corp. of Albany*, 11 Wend. 539.

Beatty v. *Knowler*, 4 Pet. 122

That the power to take private property is strictly ~~customed~~ construed, so the nature of the interest whether in fee or an easement:

Rorer on Railroads, 291-2.

Mills on Eminent Domain, sec. 48.

N. Y. R. Co v. *Kip*, 46 N. Y. 546.

Hsyareman v. *Blake*, 19 Cal. 579.

Strong v. *Brooklyn*, 68 N. Y. 1.

Portland, Saco and Portsmouth R. Co. v. *Graham*, 11 Met. 1.

The foregoing cases seem to us conclusive of the case at bar and are confidently relied on by the appellants.

Respectfully,

J. F. BROWN,

of Counsel for Appellants.

121-201

SUPREME COURT U. S.
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In Supreme Court of the United States.

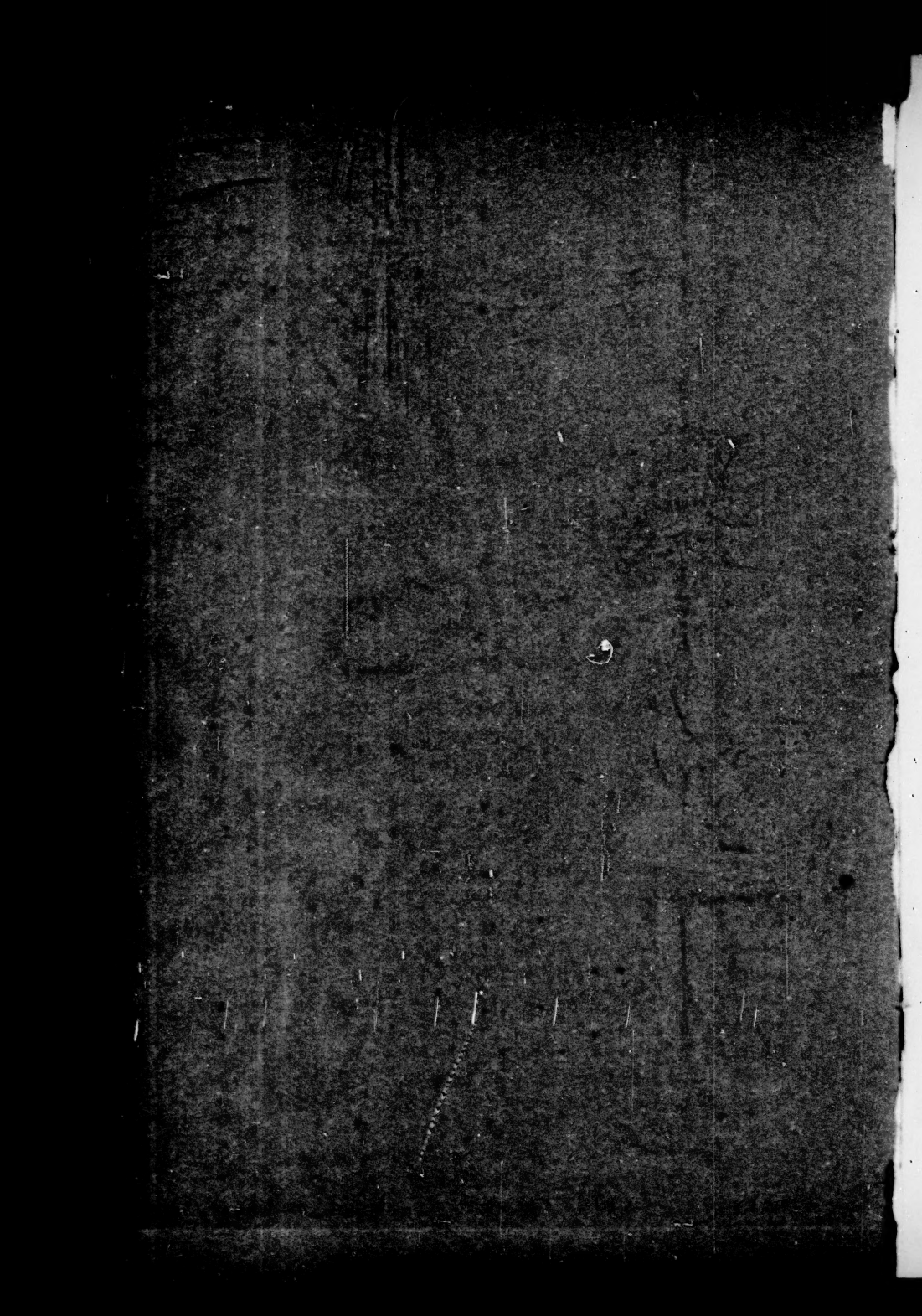
JAMES D. McCONIHAY, TRUSTEE ET. AL., APPELLANTS,

vs.

THEODORE WRIGHT, APPELLEE.

BRIEF OF R. C. McMURTRIE AND E. B. KNIGHT FOR THEODORE WRIGHT, APPELLEE.

THE KANAWHA GAZETTE GAS POWER PRINTING HOUSE.



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STATEMENT OF THE CASE.

The Winifrede Mining and Manufacturing Company was incorporated by the Legislature of Virginia on the 16th day of February, 1850, by the following act:

CHAP. 261.—An ACT to incorporate the Winifrede Mining and Manufacturing Company.

[Passed February 16, 1850.]

1. *Be it enacted by the General Assembly of Virginia:* That Gouverneur S. Bibby, William O'Connor, Richard Oakley and Henry Eagle, junior, and such other person or persons as may be hereafter associated with them, shall be and they are hereby incorporated and made a body politic and corporate under the name and style of "Winifred Mining and Manufacturing Company," for the purpose of exploring, digging, mining, raising and transporting coal and other minerals and substances, and for manufacturing mineral, vegetable and other articles, in and from the counties of Kanawha and Boone, and such other counties as may hereafter be created out of parts of said counties; and they are hereby invested with all the rights, privileges and powers conferred on such bodies politic and corporate by an act, entitled "An act prescribing general regulations

for the incorporation of manufacturing and mining companies," passed February the thirteenth, eighteen hundred and thirty-seven, and shall be subject to all the rules, regulations and restrictions provided and prescribed by said act, so far as they are applicable to and not inconsistent with the powers and privileges herein contained and granted.

2. *Be it further enacted:* That the capitol stock of the said company shall not be less than one hundred thousand dollars nor more than one million five hundred thousand dollars, to be divided into shares of one hundred dollars each; and the said company shall have the right to purchase and hold lands, not exceeding ten thousand acres at any one time, in the said counties of Kanawha and Boone, or in any new counties that have been or may hereafter be formed and created out of parts of the said counties.

3. That it shall and may be lawful for the said company to erect and construct a slack-water navigation from some convenient point on Kanawha or Coal rivers, contiguous to their said lands, and along the bed of the said Coal river to the Great Kanawha: *Provided, however,* That nothing in this act contained shall be so construed as to prevent the said rivers from being and remaining public highways, free for the navigation of all the citizens of this commonwealth; and also to construct such railroad or railroads from any point on their said lands to the Great Kanawha river or any other navigable stream in the valley of the Kanawha river and its branches, or to connect with any other railroad or improvement which is now or may hereafter be authorized by the state of Virginia in the said valley of the Kanawha and its branches; and to enable the said company to carry out the provisions in this section contained, they are hereby invested with all the rights, powers and privileges, and subjected to all the limitations and restrictions contained in an act, entitled "An act prescribing certain general regulations for the incorporation of railroad companies," passed March the eleventh, eighteen hundred and thirty-seven, so far as the same are applicable to and not inconsistent with the provisions of this act.

4. This act shall be in force from its passage.

The act referred to in the charter "*Entitled an Act Prescribing General Regulations for the Incorporation of Mining*

"*and Manufacturing Companies*" was passed February 13th, 1837, and is found on page 74, &c., of the Acts of the General Assembly of Virginia for the year 1837, and so much thereof as we think has any bearing on this case is as follows:

SECTION 1. *Be it Enacted, &c.*: That whensoever hereafter any joint stock company shall be incorporated for the purposes of manufacturing or for the purposes of exploring and mining for gold, copper, iron or other mineral substances, such company shall be established with the rights and privileges and under the rules, regulations and restrictions hereinafter prescribed:

2. Any company shall have power under the name and style set forth in the act of incorporation to sue and be sued, contract and be contracted with, to have and use a common seal and to change the same at pleasure. And *may hold real estate*, the number of acres and the county or counties in which said real estate is situate to be specified in said act of incorporation. And personal property for the purpose of conducting the business of manufacturing, exploring or mining, for which said company may be incorporated, * * but they shall not be authorized in any manner to divert the capital of said company from the specific purposes for which they are incorporated! Provided nothing herein contained shall be so construed as to prevent any corporation from tilling any lands held by them, or from selling any timber, wood or other material upon their lands.

10. * * * * * But real estate purchased by the corporators shall be conveyed to them, and when sold by them shall be conveyed to the purchaser by deed as real estate, and as such shall be held liable to the payment of the debts of the company; and to sell under execution of fieri facias in like manner as the lands of public debtors are sold.

14. * * * * * And if at any time the company shall suspend their operations for the space of two years, then their rights and privileges shall cease, and their charter shall be forfeited. But whensoever the said corporation shall be dissolved, whether by lapse of time or any other cause, their corporate name, with their right to sue and be sued, shall continue for the purpose of collecting the debts due

the company, prosecuting the rights which shall have accrued under their previous contracts, paying the debts due by them, satisfying all liabilites which they have incurred, and for the distribution of the property of the corporation among those entitled to the same.

15. That all acts for the incorporation of manufacturing or mining companies passed after the passage of this act, shall continue in force for the period of thirty years and no longer, and shall at all times after the lapse of fifteen years from the organization of the company, be liable to be amended or repealed at the pleasure of the Legislature, as if an express provision to that effect was therein contained, unless there shall have been inserted in such act of incorporation an express provision to the contrary.

The act referred to in the foregoing charter of the Winifrede Company, "Entitled an Act Prescribing certain Gener-
" al Regulations for the Incoporation of Rail Road Com-
" panies," was passed March 11th, 1837, and is found on page 101, &c., of the same volume of the acts as contains the foregoing act regarding manufacturing and mining companies.

So much of this last act as we can see has any application to the matters in controversy on this appeal are as follows:

SECTION 1. Be it enacted by the General Assembly, That whenever it shall be deemed necessary by the general assembly to grant a charter for the incorporation of a company to construct a railroad, the following general provisions shall be deemed and taken to be a part of the said charter or act of incorporation, to the same effect as if the same were expressley reenacted in reference to any such charter or act, except so far as such charter or act may otherwise expressly provide.

4. When the whole of the capital stock of the Company, or such portion thereof as the act of incorporation shall authorize, shall have been subscribed, the subscribers, their executors, administrators and assigns shall be and are hereby declared to be incorporated into a company, with all the rights, privileges and immunities and subject to all the restrictions and liabilities of a body politic in law; and by their corporate name, shall be capable in law of purchasing, holding, selling, leasing and conveying estates real, personal and mixed, so far as shall be necessary for the purposes of their incorporation, and no

further. They shall have propetual succession, and powers to make and use a common seal; and by their corporate name may sne and be sued; and may make such by-laws, rules and regulations, not inconsistent with the laws of this State, or of the United States, as shall be necessary for well ordering and conducting the affairs of the company.

9. Previously to the institution, and during the pendency of proceedings for ascertaining the damages to the proprietor for the condemnation of his land for the use of the company, the President and directors, their officers, agents and servants shall have full power and authority to enter upon all lands and tenements through which they may desire to conduct their railroad, and to lay out the same according to their pleasure, so that no dwelling house or space within sixty feet of one, belonging to any person, be invaded without his consent, and if they think the interest of the company requires it, to take possession thereof for the purposes of the company; and also to enter upon, lay out, and take possession of such contiguous land as they may desire to occupy as sites for toll houses, warehouses, depots, engine sheds, stables, workshops, and other buildings for the necessary accommodation of their officers, agents and servants, their horses, mules, and other cattle, and for the protection of the property committed to their care; *Provided*, That the land so laid out and occupied on the general line of the railroad shall not exceed, except in deep cuts and fillings, eighty feet in width; that the adjoining land for the sites of buildings shall not exceed one acre and an half in any one parcel. The President and Directors shall describe by certain limits the land which they desire to occupy for any of the purposes aforesaid; and it shall be lawful for them to purchase the land so laid out, or any part thereof. If the president and directors cannot agree with the owner or owners of the lands so entered on and laid out, on the terms of purchase, it shall be lawful for them to apply to the Court of the county, in which such land or the greater part thereof may lie, or in case they fail, within twenty days after they shall have taken possession of said land, to make such application; or if, having made the same, they shall fail to prosecute the proceedings thus commenced, diligently to a conclusion, it shall be lawful for the proprietor of the land, to make similar application; and

upon such application by either of the said parties, the Court shall appoint five discreet, intelligent, disinterested and impartial freeholders, to assess the damages to the owner, from the condemnation of his land for any of the purposes aforesaid. No such appointment however shall be made, unless ten days previous notice of the application shall have been given to the said president and directors, or to any one of them, if the proceedings shall be instituted by the proprietor of the land, or if they shall be instituted by the president and directors, then like notice shall be given to the owner of the land, or to the guardian if the owner be an infant, or to the committee, the owner being *non compos mentis*, if such owner, guardian or committee can be found within the County; or, if he cannot be so found, then such appointment shall not be made, unless notice of the application shall have been published at least one month next preceding, in some newspaper printed as convenient as may be to the court house of the county, and shall have been posted at the door of the court house on the first day at least of the next preceding term of said Court. A day for the meeting of the said freeholders to perform the duty assigned them shall be designated in the order appointing them; and any one or more of them attending on that day may adjourn from time to time, until their business shall be finished.

Of the five freeholders so appointed, any three or more may act, after having been duly sworn, or solemnly affirmed before some Justice of the Peace, that they will impartially and justly, to the bast of their ability, ascertain the damages which will be sustained by the proprietor of the land from the condemnation thereof for the use of the company and that they will truly certify their proceedings thereupon to the court of said county.

10. It shall be the duty of the said freeholders, in pursuance of the order appointing them to assemble on the land proposed to be condemed, and after viewing the same and hearing such proper evidence as either party may offer, they shall ascertain, according to the best of their judgment the damages which the proprietor of the land will sustain by the condemnation thereof for the use of the company. In performing this duty, they shall consider the proprietor of the land as being the owner of the whole fee-simple interest therein; they shall take

into consideration the quantity and quality of the land to be condemned, the additional fencing which will be required thereby, and all other inconveniences which will result to the proprietor from the condemnation thereof, and shall combine therewith a just regard to the advantages which the owner of the land will derive from the construction of the railroad for the use of which his land is condemned. Provided, That not less than the actual value of the land, without reference to the location and construction of the road, shall be given by the commissioners.

12. The report of the freeholders, so made, together with the certificate of the magistrate as aforesaid, shall be forthwith returned by the said freeholders to the court of the county; and unless good cause be shown against the report, it shall be confirmed by the court and entered of record. But if the said report shall be disaffirmed, or if the said freeholders being unable to agree, shall report their disagreement, or if from any cause they should fail to make a report within a reasonable time after their appointment, the court may, at its discretion, as often as may be necessary, supersede them or any of them, appoint others in their stead, and direct another view and report to be made, in the manner above prescribed. In default of the payment or tender of the amount of damages so assessed, to the proprietor, or the payment of the same into court, when for good cause shown, the court shall have so ordered it, the court shall render judgment in favor of such proprietor for the amount of said damages and double costs, and may thereupon either compel the company to pay the same into court, or award process of execution therefor, as to them may seem right. And when such judgment shall be satisfied by the payment of the money into court or otherwise, the title of the land for which such damages where assessed shall be vested in the company in the same manner as if the proprietor had sold and conveyed it to them.

20. The works of the company shall be executed with diligence, and if they be not commenced within two years after the passage of the act of incorporation, and finished within the period which may be therein prescribed; and in case the company, at any time after the said road is completed, shall abandon the same, or cease to use and keep it in proper repair, so that it shall fail to afford the intended accommodation to

the public for three successive years, then and in that case, also their charter shall be annulled as to the company, and the State of Virginia may take possession of the said railroad and works, and the title shall be vested in the said State so long as it shall maintain the same in the state and manner required by said charter; otherwise the lands over which the said road shall pass, shall revert to and be vested in the person or persons from whom they were taken, by concession or inquisition as aforesaid, or their heirs or assigns.

22. Upon the railroad the company shall have the exclusive right of transportation, and when a portion thereof, shall be opened for transportation, they shall at all times furnish and keep in good repair the necessary machines, carriages and other requisites for the safe and convenient transportation of persons and property. It shall be their duty, at all times, upon the payment or tender of the lawful or customary tolls, to transport to any convenient place of delivery, on the railroad, which the owner of the goods may indicate, and there to deliver all articles which shall be delivered to them for transportation, offered to them in proper condition to be transported, at some place on the road convenient for the reception thereof. They shall give no undue preference in transportation to the property of one person over that of another, but as far as practicable shall carry each in the order of time in which it shall be delivered or offered for transportation with the tolls paid or tendered. If the company or any of its officers or agents, shall fail to receive, transport or deliver in due time, any property so offered or delivered to them, or shall fail to take up or set down any passenger or passengers at such convenient point, as he or they may desire, upon the payment or tender of the passage money or shall demand and receive more than the lawful tolls or rates of transportation, they shall forfeit and pay to the injured party not less than twenty-five nor more than one hundred dollars, at the discretion of the court, to be recovered by motion, in the county or corporation court, or superior court of law for the county or corporation in which such preference has been given; or in which they have refused to comply with the requisitions of this section.

35. Any part of any charter or act of incorporation granted agreeably to the provisions of this act, shall be subject to be

altered, amended or modified by any future legislature, as to them, shall seem proper, except so much thereof as prescribes the rate of compensation or tolls for transportation. Provided, That the rights of property acquired under this act, or any other act adopting the provisions of this act, shall not be taken away or impaired by any future act of the legislature.

In the month of August, 1849, the Legislature of Virginia adopted a new Code, known as the Code of 1849, which went into operation on the 1st day of July, 1850, and the 1st section of the last chapter (216) is as follows:

SECTION 1st. All the provisions of the preceding chapters shall be in force upon and after the first day of July next, and all acts and parts of acts of a general nature in force at the time of the passing of this act, shall be repealed from and after the said first day of July next, with such limitations and exceptions as are hereinbefore or hereinafter expressed.

This Code of 1849 remoddled and re-enacted the entire corporation laws of the State, and the provisions of section 20 of the act of March 11th, 1837, hereinbefore copied, were entirely omitted, and have never since been the law of the State.

We copy such parts of the Code of 1849 as we consider has application to this case.

Chapter 56 contains provisions for the government of corporations generally, and is applicable to all corporations.

The 11th section of this chapter makes this provision with regard to the title to land acquried by condemnation: * *

* "the sum so ascertained to be a just compensation "may be paid to the person entitled thereto, or into court. "Upon such payment the title to that part of the land for "which such compensation is allowed shall be absolutely "vested in the company, county or town in fee simple."

28 When any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property and debts due to it shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests. And such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property and debts among those entitled thereto.

Chapter 61 of the Code of 1849, applies to companies incorporated to construct and carry on works of internal improvement, including railroads, and contains among others the following provisions:

SECTION 1. Every company which is governed by the act passed on the 7th day of February, 1817, prescribing certain regulations for the incorporation of turnpike companies, or by the act passed on the 11th day of March, 1837, prescribing certain general regulations for the incorporation of railroad companies, and every company which after the commencement of this act, shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the fifty-seventh chapter, and in this chapter so far as they can apply to such company without violating its charter.

31. If the works of any company be not commenced and completed within the time prescribed by its act of incorporation, or if after such work be completed the company shall abandon the same, or for three successive years cease to use and fail to keep them in good repair, in each of these cases the State may either proceed by quo warranto or take possession of the works and property of such company, and in case of so taking possession shall keep the same in good repair and have all the rights and privileges previously vested in the company. But the State shall pay the company for such works and property the value of the same at the it takes possession thereof.

34. The charter of every company which is governed by the act passed on the eleventh day of March, 1837, prescribing certain general regulations for the incorporation of railroad companies, and of every company hereafter incorporated which shall be governed by this chapter, may be altered or modified by any future legislature, as may seem to it proper, except that no law shall be passed for taking from a company its works or property without making to it just compensation, or for changing its tolls without its assent, in any other cases than such as are specially provided for in this chapter.

It will be noticed that the act incorporating the Winifrede Mining and Manufacturing Co. was passed after the enact-

ment of the Code of 1849, and before this Code went into effect.

The Winifrede Company on the 8th day of January, 1853, acquired title to some ten thousand acres of land in Kanawha county on waters of Coal and Kanawha rivers by deed from Snow, trustee, and others, (page 49 of record), and soon after constructed a railroad under the power conferred by its charter from this tract to the Kanawha river for the transportation of the product of its coal mines, and in constructing said railroad, entered, and constructed the same on certain lands of John McConihay, under the authority conferred by section 9 of the act of March 11th, 1837, hereinbefore copied.

On the application of John McConihay, the land so entered upon and taken by the Winifrede company was condemned as prescribed by the said act of March 11th, 1837, in August, 1853, (the proceedings having been commenced the preceeding April), and the sum of $2,750 was awarded the said McConihay as damages for the land taken by the freeholders appointed for the purpose.

The company objected to this award, but the court confirmed it, and also rendered judgment in favor of McConihay for the amount of the award and double costs on the 24th day of November, 1853, (page 32), as allowed in section 12, of the act of 1837.

The company appealed from the judgment of the county court confirming the award to the circuit court of Kanawha county, and the circuit court reversed this judgment. McConihay then appealed from the judgment of the circuit court to the Supreme Court of Appeals, which was the court of last resort, and the Supreme Court reversed the circuit court and affirmed the judgment of the county court confirming the award.

So much of the record in condemnation proceedings as was thought necessary to be made part of this cause, is found in the printed record on pages 25 to 36 inclusive.

It is the land so condemned that is the subject of controversy in this suit.

On the 1st day of July, 1855, the Winifrede Company executed a deed of trust upon all of its property, including "*ways*

and rights of way," to James J. King, trustee, to secure an issue of bonds (page 84, &c., of record), and it also become indebted to numerous other creditors, who recovered judgments against the company on their debts, prior to the institution of the chancery suit next mentioned.

The Bank of Virginia and seven other of these judgment creditors in 1860, brought a suit in chancery against the Winifrede Company. John P. Crosby who had been appointed trustee in the deed of trust in place of King, deceased, and numerous other of the judgment creditors of the company, including John McConihay, to enforce the lien of their judgments against the real estate of the company.

The bill in that suit is found on page 52, &c., of the record.

On the 26th day of January, 1861 (erroneously printed 1881 in the record), the cause was heard by consent of all parties, and a decree rendered adjudicating the debts of the Winifrede Company, and the priority thereof as liens upon its property, and for the sale of the property to satisfy these debts.

So much of this decree as is material in this cause is found on page 21, &c., of the record.

It will be noticed that the judgment of John McConihay for $2,750 before mentioned, had been assigned and transferred by him to J. C. Harriott, in trust for Gouverneur S. Bibby, one of the original incorporators of the Winifrede Company, before the rendition of this decree, and is by the decree made one of the first liens upon the company's property.

This decree of sale was executed by the commissioner, T. B. Swann, on the 26th day of October, 1865, and the property sold to Henry A. Cram for $80,000.00, a sum sufficient to cover the indebtedness of the company due to strangers, (see report of sale, page 94, &c., of record). And on the 23rd day of April, 1866, by the written consent of all the parties to the suit, this sale was confirmed, the decree of confirmation is found on page 96, and the consent of the parties and the endorsement of the Judge (D. Polsley) on pages 23 and 24 of record.

On the 24th day of June, 1870, Commissioner Swann reported the purchase money paid in full and he was ordered to make a deed to the purchaser (page 22) and this deed was made on the 25th day of June, 1870, and is found on page 51 of record.

The said Henry A. Cram, tne purchaser of the property, really purchased the same in trust for himself and other parties, who were interested in the Winifrede Company or held debts against it; and in 1878 the said Cram brought suit in equity in the Kanawha Circuit Court which was removed to the United States Court to wind up the trust, dispose of the property and distribute procee ls among those entitled.

The bill and two amended bills in that suit are found on pages 56 to 65 inclusive of record.

A decree of sale was rendered in the last named cause in November, 1880, (pages 7 to 10 of record) and the property was sold under this decree to the complainant, Theodore Wright, on the 30th day of July, 1881, and the sale thereof was confirmed the same day, (pages 10, 11 and 12 of record.)

Theodore Wright, the purchaser, entered upon the property and began the construction of a railroad from the mines to the river (the old one having been torn up and the iron sold by the order of the court in the suit aforesaid of the Bank of Virginia, et als. vs. The Winifrede M. & M. Co. et al., as appears by the said bill of Henry A. Cram, (page 59 of record) and was confronted by the notice from R. W. Cabell and James D. McConihay acting as trustees for the children and grand children of John McConihay, found on page 13 of record.

The said Wright at once (in September, 1881) brought this suit against the children and heirs of John McConihay to quiet his title, prevent a multiplicity of suits and compel the defendants to assert and show by what title or claim the notice aforesaid was given. This bill is on pages 1 to 6 of record.

J. H. McConihay, one of the defendants, filed an answer the 16th November, 1881, practically confessing the bill and disclaiming all claims or ownership to the land in controversy, page 37, the other defendants demurred and the demurrer was overruled November 23rd, 1881, and they thereupon filed their answer, (pages 37 to 45) but upon the final hearning all the defendants filed disclaimers of all right or interest in the lands in controversy, except Annie E. Cabell and Ella Anderson, daughters of John McConihay and their husbands, Daniel S. McConihay, a son, and the three children of Ira McConihay, another son (see page 68 for these declaimers.)

So six of the children and the descendants of another child of John McConihay abandoned all claim to the land in controversy and declined to litigate, and four of the children and the descendents of another child are setting up claim.

The answer before referred to denies that the Winifrede Company acquired any title to the land in controversy by condemnation; that Cram ever acquired any title by the judicial sale of the Winifrede property, and avers that if the Winifrede Company acquired title it was forfeited for the non payment of taxes and also for non uses of the property. The cause came on for final hearing March 11th, 1882, and was decided in favor of the complainant, (page 66 of record;) a petition for rehearing was filed May 20th, 1882, (pages 90 and 91) and refused November 18th, 1882, (page 93) and this appeal was then taken.

The complainant relies upon the following points of law and fact as presented by the record:

The condemnation of the property is fully proved by the record filed and is in fact admitted by the answer, as is also the fact that John McConihay took judgment for the damages awarded, $2,750.00, and double costs. That this judgment was paid to McConihay and assigned by him prior to 1860, is fully proved by the depositions of W. A. Quarrier, (page 68) of J. H. McConihay, a son, (page 82) and the adjudication made in the decree of sale of the Winifrede Company's property at the suit of the Bank of Virginia and others to which suit the said John McConihay was a party, (page 21.) And that this judgment was finally paid by the sale of the property to Cram, is also fully proved by the fact that the property sold for enough to pay off all the debts of the Company due to strangers and this judgment was adjudicated to be the first lien and the court decides that the money has been distributed according to the decree of sale, (see decree of June 24th, 1870, page 22.)

This last decree erroneously recites the date of the decree of sale as January 31st, 1861, when it was January 26th, 1861.

The fact of this payment is also proved by the deposition of T. B. Swann, the commissioner, (page 75) who states that after paying all the money decreed to be paid there was still a surplus of purchase money left of something over $100.00.

Section 10 of the act of March 11th, 1837, (under which act this condemnation was had) required the freeholders assessing damages for the land condemned to consider the proprietors of the land as the owner of the whole fee simple interest therein, and the quantity and quality of the land to be condemned and should give *not less than the actual value* in any event; and section 12 of the same act provides that when judgment was rendered for the amount of the damages in favor of the proprietor, against the company (as was done in this case) and such judgment should be satisfied by the payment of the money into court or otherwise (as has also been done in this case.) "*The title of the land for which such damages were assessed shall* "*be vested in the Company in the same manner as if the proprie-*"*tor had sold and conveyed it to them,*" and the confirmation and recordation of the report and payment of the judgment is the sufficient and only muniment of title.

Section 11 of chapter 56 of the Code of 1849, which went into effect before this condemnation was had, is to the same effect, viz:

"The sum so ascertained to be a "just compensation may be "paid to the persons entitled thereto or into court."

"*Upon such payment the title to that part of the land for which* "*such compensation is allowed, shall be absolutely vested in the* "*Company, county or town in fee simple.*"

And whether the act of March, 1837, or the code of 1849, controls in this cause as to the title acquired by the Winifrede Company by this condemnation and the payment of the money, makes little difference, as under either law they acquired an absolute and complete title in fee simple—just such a title as a sale and deed by the owner could convey.

The claim set up in defendants answer that the plaintiff's title had been lost through non payment of taxes has been abandoned as no evidence whatever was taken to sustain it.

There are really left then but two issues in the case.

1st. Has the title of the Winifrede Company to the land in controversy acquired by the condemnation proceedings been lost by non uses? And if not

2nd. Has the plaintiff, Theodore Wright, acquired title to said land.

The proof fully shows that the railroad built by the company from its mines to the Kanawha river, and in part over the condemned land, had not been used since the purchase by Cram in 1865, up to the purchase by Wright in 1880, that in fact the ties had decayed and the rails were taken up and sold in 1866, and the proceeds applied to the payment in part of the purchase money due from Cram. And it is claimed by the defendants appealing that by the 20th section of the act of March 11th, 1837, the land acquired from John McConihay by the condemnation, thereby reverted to and was vested in him.

But the Winifrede Company was incorporated "*for the pur-*
" *pose of exploring, digging, mining, raising and transporting*
" *coal and other minerals and substances, and for manufacturing*
" *mineral, vegetable and other articles in and from the counties*
" *of Kanawha and Boone,*" and was invested with the powers, rights and privileges, and made subject to the rules, regulations and restrictions prescribed in the act regulating the incorporation of mining and manufacturing companies.

The above is the full object, scope and purpose of the act incorporating this company, and in order to enable it to carry out its object and purpose as a mining and manufacturing company of the minerals and articles mentioned, it was authorized to connect its lands by railroad with the Kanawha river, or with any other railroad which may be authorized by the State of Virginia in the Valley of the Kanawha and its branches, and to enable it to make such connections it was invested with all the rights, powers and privileges, and subjected to all the limitations and restrictions contained in the act of March 11th, 1837, regulating the incorporation of railroad companies "*so far as the same are applicable to and not incon-*
" *sistent with the provisions of the act creating it,*" that is with its charter as a mining and manufacturing company.

The Winifrede Company thus was a mining and manufacturing company with power to build a railroad, and not a railroad company with power to mine and manufacture.

The act which creates it as a mining and manufacturing company, and makes it subject to the provisions of the general law (act of February 13th, 1837) regulating such companies

is paramount, and the act of March 11th, 1837, from which its powers to construct a railroad is derived, is subordinate and of effect only when consistent with the provisions of the mining company's act.

The Winifrede Company was under no obligations and had no right to use its railroad in the public service to carry passengers and freight for hire. Such an assumption would be inconsistent with the purpose for which it was created, viz: to mine and transport coal and other minerals and manufacture mineral, vegetable and other articles. The 2nd section of the act regulating mining and manufacturing companies prohibited it from diverting its capital from these specified purposes. The right of transporting is evidently limited in the charter to the coal and other minerals digged, mined or raised by the company, and the only use to which it could put its railroad under its charter, was to carry the products of its own mines and manufactory to the Kanawha river or to such other railroad as it was allowed by its charter to make connection with.

The idea that the Winifrede Company was in any sense made a public carrier by the authority given it to build a railroad and so subject to the penalties imposed upon public carriers by the act of March 11th, 1837, which failed to keep up and operate their roads is also rebutted by the fact that the corporate life of the public carrier was made perpetual (see section 4th of the act of March 11th, 1837) while the life of the Winifrede Company was limited to thirty years (see section 15 of the act of February 13th, 1837); and also by the further fact that when the public carrier abandoned its road or ceased to use and keep it in proper repair to afford the intended accommodation to the public, for three years, the State might take possession and maintain and operate the same, but it would hardly be claimed that under the charter of the Winifrede Company the State could take possession of its road and mines and operate the same, and if it did not operate its mines there would be no occasion for operating its road.

We submit then that the real estate and property of the Winifrede Company was subject to the payment of the debts of the company, and could only be used and appropriated for that purpose under the 10th and 14th sections of the act of

February 13th, 1837, which is the paramount act controlling its chartered powers and privileges, rules, regulations and restrictions. And the provisions of the 20th section of the subordinate act of March 11th, 1837, "*is not applicable*" to a mining and manufacturing company, and is "*inconsistent with*" the disposition required to be made of the property of such a company, and can in no way be used to take from the Winifrede Company, a mining and manufacturing company, pure and simple (or from its creditors), the real estate it had bought and paid for, and give it back to the former owners.

Under the 20th section of the act March 11th, 1837, it was only the land of a railroad company incorporated to perform a public service, and under obligations to carry passengers and freight for hire, that reverted to and vested in the former owner when it "failed to afford the *intended accommodation to the public* for three successive years, and which the State had a right to maintain and operate, and failed to do. And as to such a railroad corporation not only the lands acquired by inqusition, but also by concession, not simply the lands held by condemnation but also by deed or contract, went back to the former owner when it corporate privileges ceased and the State failed to assert its rights.

We think it will hardly be claimed that the Winifrede Company was a corporation of this character, that it was chartered to perform a public service and under obligations subject to the pains and penalties of the 22nd section of the act of March 11th, 1837, to transport passengers and freight and authorized to charge therefor; that the State had any right under its charter to take possession of its railroad and works, and become vested with the title thereto, and maintain the same in the manner required by its charter under any circumstances, or that the ten thousand acres it acquired by deed from Snow, trustee, and others, could be taken from it and given to the former owners for its failure to exercise its corporate powers. And yet if it is not a corporation of the character above described, it is not subject to the provisions of the 20th section of the act of March 11th, 1837, and its real estate, whether acquired by deed or by condemnation, can not be taken from the company or its creditors and returned to the former owners, but is assets for the payment of the debts of the corporation, under sections

10 and 14 of the act of February 13, 1837, heretofore referred to.

But if the Winifrede Company had been incorporated under the railroad act of March 11th, 1837 only, and solely as a railroad company, and still the land condemned from John McConihay could not revert to the former owner for non user, but was assets for the payment of the debts of the company, and was properly and legally disposed of for that purpose.

The 1st section of the railroad act of 1837 made the provisions of that act a part of the charter or act of incorporation of every railroad company, as if expressly re-enacted in such charter or act except so far as such charter or act may otherwise expressly provide.

As we have seen the charter of the Winifrede Company did expressly provide otherwise by making the railroad act of 1837 a part of its charter, only so far as it was applicable to its charter as a mining and manufacturing company, and was not inconsistent with the law regulating such companies.

But we are now discussing the question of the forfeiture of the Winifrede Company's real estate for non user, as if the railroad act of 1837 and all the provisions therein had been made part of its charter without limitation or reservation.

The last section (35) of the railroad act of 1837 reserves the right to any future legislature to alter, amend or modify any charter granted under that act as to them may seem proper, except as to that portion thereof prescribing compensation for transportation. And provided, that the rights of property acquired under that or any other act adopting its provisions shall not be taken away or impaired by any future act of the legislature.

The proviso was evidently intended for the protection of the railroad company solely, and to prevent any rights to property it acquired under that or other acts being lessened or impaired by future legislation.

It was perfectly legitimate then and within the power of the legislature to alter, amend or modify the charter of every railroad company incorporated under the act of 1837 as they thought proper, except as to its rates of transportation and so

as not to take away or impair its property rights, and the legislature saw proper in enacting the Code of 1849. which went into operation the 1st of July, 1850, to re-enact the general railroad law and to make every company incorporated under the act of 1837, subject to the provisions of the new act (section 1 of chapter 61 of Code of 1849), and to repeal in toto the act of 1837, (see section 1 of chapter 216, Code of 1849.)

And when the McConihay property was condemed in 1853, railroad companies and the rights of property then acquired by them by purchase or condemnation, were regulated and controlled by the provisions of the Code of 1849.

The legislature when enacting this Code about ten years after the passage of its first railroad act of 1837, had seen the injustice of taking the property of a company from its creditors and stockholders and confiscating it to the State without just compensation, or of giving it back to the former owner from whom it had been purchased or condemned, and full consideration paid under any circumstances.

It therefore repealed in toto and forever section 20 of the act of 1837, giving the State in case of non-user, the right to take the title to and possession of the company's property without any payment therefor, and returning it to the former owner if the State failed to do this and instead thereof, by section 31 of chapter 61 of the Code of 1849, permitted the State to take possession only upon payment of full value for the company's works and property and by section 34 of the same chapter prohibited the passage of any law taking from a company its works or property without making to it just compensation. And in section 28 of chapter 56, which applies to corporations of every kind, it provided when *any* corporation shall expire or be dissoled or its corporate rights and privileges shall have ceased, all its works and property and debts due it shall be subject to the payment of its debts and then to distribution among its members according to their respective interests.

So when this McConihay property was condemned there was no provision in the charter of the Winifrede Company or of any other railroad company that allowed the property acquired by condemnation or by purchase to revert to the former owner in any contingency or under any circumstances, but all of the property of all corporations however acquired, was subject

first to the payment of their debts and the surplus to distribution among their stockholders.

We submit, then, whether the Winifrede Company is to be treated and considered as a Mining and Manufacturing Company and governed by the act of February 13th, 1837, regulating such companies, or as a railroad company incorporated under the act of March 11th, 1837, with its charter altered, amended and modified by the code of 1849, pursuent to the right reserved in that act, or as a company incorporated under both acts and subject to the provisions of both as altered, amended and modified by the said code, all the property acquired after the 1st day of July, 1850, when the said code went into effect, was subject to the payment of its debts and to distribution among its stockholders as provided both in the mining and manufacturing company's act and in the railroad company's act, in the code of 1849, and in no aspect of the case did the defendants or their ancestor, John McConihay, ever acquire any title to the land condemned in 1853, at the instance and by the procurement of John McConihay himself, and for which he has received full compensation.

The answer of the defendants places stress upon the provision in the act of 1837, (section 10) requiring the freeholders in assessing damages, to take into consideration the advantages which the owner of the land would derive from the construction of the railroad, for the use of which the land is condemned, and it will doubtless be argued that when the use of the railroad ceased the consideration for the condemnation to that extent failed.

If this construction of the law is correct, we do not see how it avails the defendants in this cause, for as we have seen the non user of the property did not restore it to their ancestor in any contingency.

But we deny that this is the real meaning and proper construction of the law.

It will be noticed that the freeholders were required to give the land owner the actual value of the land in any event, and could only offset the advantages of construction against the additional fencing and other inconveniencies resulting from the condemnation; and by "*advantages of construction*", the law had reference not to any advantages resulting from keeping up and

maintaining a great public highway common to the land owner and the public at large but some especial and peculiar advantages resulting to each individual land owner from the "*construction*," (not the operating) of the railroad through his land in some particular location, as if it should result in draining his lands, or in building an embankment that would serve for a boundary fence, or a wall that would resist the encroachment of a river.

That this is the real meaning and intent of the act is made apparent by the proviso.

"Provided; That not less than the actual value of the land "without reference to the *location and construction* of the road "shall be given by the commissioners," and such in effect was the adjudication of the Supreme Court of Va. in James River and Kanawha Co. vs. Turner, 9 Leigh, 313, and which adjudication has been repeatedly approved in subsequent decisions of the Supreme Court and is now the basis upon which damages are awarded in condemnation proceedings.

The only other issue remaining for discussion is whether or not the complainant Theodore Wright has acquired title to the land condemned from John McConihay.

The defendants have no interest in this issue except to use it as a technical defence to this action if we are right in the contention that this land has never reverted to them nor to their ancestor.

It is very evident that no court of equity would intentionally and knowingly sell the 10,000 acres of mining lands belonging to the Winifrede Company for the benefit of its creditors and stockholders without selling at the same time and as appurtennat to these mining lands their connection with the Kanawha river obtained at so large an expense and by which alone was it possible to operate them, and without which they possessed no value.

And it is also evident that these condemned lands connecting the mining tract with the Kanawha river was deemed by court and suitors in the case of the Bank of Virginia and others vs. The Winifrede Company and others so completely appurtenant to and part of the mining tract that very little attention was given or attempt made to designate them by any separate description.

The bill in that suit (page 54 of record) avers that the Winifrede Company owns some 10,000 acres of land mostly in Kanawha county and partly in Boone, set out and described in the deed from Snow and others; that the complainant's judgments are liens upon the lands of the company; and that the Winifrede Company on the 1st day of July, 1858, did execute a deed of trust upon *their estate aforesaid* and certain personal property specified, and a copy of this trust deed is exhibited with the bill.

Now this deed of trust embraces specifically "the ways and rights of ways" of the company (page 85 of record) and undoubtedly conveyed the condemned lands.

The plaintiffs evidently considered that the description of the lands of the company given in their bill was of the same import as the description given of them in the trust deed, and that both bill and trust deed embraced all of the lands of the company.

The decree of sale (page 22 of record) directs the sale of "that 10,000 acre tract of land belonging to the Winifrede "Company fully set out and described in the bill *and exhibits*, "and other proceedings in the cause, and lying *on Kanawha* "and Coal rivers and on Field's creek, and in the counties of "Kanawha and Boone, together with *all the improvements there-* "*on used in mining, transporting and shipping of coal, including* "*railroad iron, &c.*"

That this decree of sale embraced the condemned land there can be no doubt as it embraced the land fully set out and described, not only in the bill, but in the exhibits also, which included the King trust deed; and included the lands lying on Kanawha river as well as Coal river and Field's creek, and none of the lands lay on Kanawha river except a portion of the condemned land as will be seen by Snow's deed, page 49, and the defendant's diagram opposite page 52, and included the lands upon which *all* the improvements were placed, used in the mining, *transporting and shipping of coal, including railroad iron, &c.*

The commissioner reports (page 94, &c., of record,) that in *pursuance of this decree of sale* he advertised to be sold that valuable tract of 10,000 acres of land belonging to the Wini-

frede Company lying in the counties of Boone and Kanawha *and fully setforth in the papers of the cause*, and all the *railroad iron*, engines, cars picks, shovels and other utensils, *upon the property used in the mining and shipping of coal*, and knocked this property off to Henry Cram for $80,000.00, a sum sufficient to cover the indebtedness of the company to strangers, but not to stockholders.

It is very evident that this sale and report was intended to embrace and did embrace all the property decreed to be sold and all the property of the Winifrede Company, and the case went out of court June 9th, 1873, for want of prosecution, (page 25) without a suggestion or claim from any one creditor or stockholder that the company had any property not disposed of by this sale.

This sale to Cram was confirmed by consent of all the parties to the suit (page 96) and by decree of June 24th, 1870, commissioner Swann was directed to execute a deed to Cram for the lands purchased by him, (page 22.)

Cram directly after his purchase in 1865, took possession of the property including the lands acquired from McConihay by condemnation, and claimed, held and used it, as his own until the sale to Wright in 1881, and John McConihay conceeded and recognized his title to the lands acquired by condemnation from himself.

See deposition of Diddle, pages 69 to 75, and of Swann, pages 75 to 82, and of John H. McConihay, pages 82 to 84.

The West Virginia statute of limitations to real actions, is as follows:

Section 1st of chapter 104 of code, of 1868.

"No person shall make an entry on or bring an action to "recover any land but within ten years next after the time at "which the right to make such entry or to bring such action "shall have first accrued to himself or to some person through "whom he claims."

We submit then that by the decree of sale in the said suit of the Bank of Virginia and others vs. The Winifrede Company and others, and the sale made pursuant to that decree and the confirmation thereof, Henry A. Cram became the owner of and invested with the title to the lands of the Winifrede Company, including the land acquired by condemnation from Mc-

Conihay and now in controversy on this appeal. And that if there was ever any doubt about such ownership and title, it has been completely removed by his sixteen years possession under *bona fide* claim of title, the validity and justice of which title, possession and claim was admitted by John McConihay as long as he lived.

If these proceedings in the suit of the Bank of Virginia and the long possession and claim of Cram did not vest him with the title to all the lands of the Winifrede Company, then such title as he did not acquire remained in the company.

Cram and the Winifrede Company together certainly owned them all.

And when Cram brought his suit to dispose of these lands and distribute the proceeds among his *cestui que trusts* it occurred to the attorneys conducting it that a sale therein might be embarrassed by the lack of particularity of description of the property sold in that case, and especially by the failure of the deed made by commissioner Swann to Cram (page 51) to convey with certainty and clearness all the property that was sold.

And to remove completely all question or doubt about the matter and settle it so no dispute thereafter could be had, Cram filed an amended bill (page 65) averring that the road bed and railroad track from the ten thousand acre tract to the Kanawha river was sold to him and should have been conveyed in the commissioner's deed, and praying that it might be treated as part of the property to be sold in the suit he had brought and as embraced in his deed.

The Winifrede Company was made a party to this amended bill and was served with process (see recitals in decree of November, 1880, page 7,) and filed an answer admitting the averments in the amended bill (page 65) and upon the cause as thus presented with Cram as plaintiff claiming the land now in controversy, for himself and his cestui que trusts, and that it should be sold as part of the trust estate; and with the Winifrede Company as a defendant served with process and filing answer confessing the plaintiff's claim, and with the fact as we insist demonstrated that the land belonged to either the said plaintiff or the said defendant (and it now makes no difference which for the purposes of this suit,) the court by its decree of

November 16, 1870, (pages 7 to 10) adjudicated that it was part of the trust estate held by the complainant and so decreed its sale.

By this adjudication and decree the Winifrede Company is concluded and under this adjudication and decree the complainant, Theodore Wright purchased, and the sale to him was confirmed, (pages 10 to 12) July 30th, 1881.

And if there could be any doubt about Cram having acquired this property by the sale and confirmation thereof, made in the Bank of Virginia suit and his long possession and claim of title following, there can possibly be no doubt about Wright having acquired it by the adjudication and sale made in the suit of Cram vs. Bibby, the Winifrede Company and others.

The defendants' answer (pages 39 to 45) admits in full detail the condemnation of the land in controversy, but claims that it reverted to their father, John McConihay, because of non user by the Winifrede Company, (which claim, we trust, has been hereinbefore sufficiently discussed) and that their father conveyed to them by deed of October 27th, 1875, (pages 13 to 19,) and admit that in this way they still claim the land and had the notice given to the complainant Wright, found on page 13 of record.

The answer also sets up the amended bill No. 2 filed in the Cram and Bibby case (page 65) admits that an answer thereto was filed for the Winifrede Company, (found also on page 65) and that the court adjudicated in the Cram and Bibby case that the land in controversy was part of the Cram land and decreed its sale and that the complainant Wright purchased under this decree; but it avers that said answer of the Winifrede Company was filed without authority and without service of process and in substance that such decree was obtained by Cram by fraud.

To this answer there is a general denial and the defendants have taken no proof whatever to sustain it, and if they had they could not attack or impeach the judgment and decree of the court for fraud in this collateral manner, and in a suit to which the person who is alleged to have perpetrated the fraud and his *cestui que trusts*, who have benefited by it, are not parties.

Nor can these defendants impeach that decree for fraud by any proceedings or in any way as they have no title or valid

claim to the land in controversy and therefore no interest in the matter therein adjudicated.

That the complainant is entitled to relief in equity upon the case made out in pleadings and proof, is, we submit, fully settled by the following authorities:

Holland vs. Challen, 110 U. S., 17.

Wkile this case arose under a Nebraska statute it lays down the general principles of equity jurisdiction covering the suit before the court.

Decamp vs. Carnahan, 26 West Va., 839; Pomeroy's equity jurisprudence, sections 250 and 271, 1398 and 1399.

One of the grounds upon which courts of equity take jurisdiction is that the complainant has no adequate remedy at law.

If in possession with the legal title he can not sue in ejectment and is obliged to lie hepless so far as legal remedies are concerned until his adversary selects his own time and opportunity to strike, and in the meantime he can make no use or disposition of his property and every purpose or effort to improve it are completely paralyzed.

And whether in or out of possession with only an equitable title, he can not obtain redress at law, and equity will give relief.

Branch vs. Mitchell, 24 Arkansas, 431; King vs. Carpenter, 37 Michigan, 363; Lawrence vs. Zimpleman, 37 Arkansas, 645; note to section 1399, Pomeroy's equity jurisprudence, page 436.

In this case Wright has the complete equitable title to the land in controversy under the judicial sale made by the U. S. court in Cram vs. Bibby and others and the confirmation of that sale by the court but the court held the legal title awaiting the full payment of the purchase money under the terms of the decree of sale.

Under these circumstances Wright could maintain no action at law to settle his title and allow him to go on in safety with his contemplated improvements, and enjoy his property in peace and quiet. And neither Cram nor the Winifrede Company could maintain such action after the judicial sale and its confirmation, and there was nothing left for Wright to do after

receiving the threatening notice but to invoke the equity power of the court which had sold him the land and was holding the legal title, to protect him in the possession and enjoyment of his purchase and adjudicate his right thereto.

We respectfully submit that the decree of the District court is right and should be affirmed.

R. C. McMURTRIE,
E. B. KNIGHT,
For Theodore Wright, Appellee.

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In Supreme Court of United States.

JAMES D. McCONIHAY, TRUSTEE ET. AL., APPELLANTS,

vs.

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SUPPLEMENTAL BRIEF OF R. C. MCMERTRIE AND E. B. KNIGHT FOR THEODORE WRIGHT, APPELLEE.

THE KANAWHA GAZETTE PRIMT.

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The appellees' brief having been prepared and filed in this cause before the appellants' was filed we respectfully add some suggestions upon the points discussed by appellants' counsel.

Beyond all controversy the Winifrede Company was incorporated as a mining and manufacturing company and subject to all the provisions of the act of February 13th, 1837, regulating the incorporation of such companies; and not one of the provisions of the said act of February 13th, 1837, can be stricken from its charter, nor its force or effect impaired by the fact that the legislature in the act incorporating it, in order to enable it to make connection between its coal mines and the Kanawha river, invested it with the rights, powers and privileges, and subjected it to the limitations and restrictions of the general railroad law of March 11th, 1837, accompanied with the express qualification that it should be invested with such rights, powers and privileges, and be subjected

to such limitations and restrictions, only so far as they were applicable to and not inconsistent with its powers and privileges under the act regulating mining and manufacturing companies.

We submit then that it can not be maintained that its property bought and paid for and acquired in fee can be disposed of otherwise than as provided in its charter as a mining and manufacturing company, viz: subjected to the payment of its debts.

Nor can it be maintained that it became a railroad corporation under obligations to construct and maintain a line of railroad for the public use and to transport passengers and carry freight for hire with no place of beginning except upon its own coal lands and no definite terminus at the other end and be subject to the pains and penalties imposed upon railroad companies which are incorporated to serve the public with the right to charge therefor, for all such powers, responsibilities and liabilities and such use and application of its capital would be grossly inconsistent with its powers and privileges as a mining and manufacturing company.

It is argued by appellant's counsel that if only a mining and manufacturing company the legislature could not confer upon it the right of eminent domain and such and act would be unconstitutional.

The legislature itself is the judge of this matter, and as it determined that the Winifrede Company, incorporated for the purpose of developing a coal field hitherto inaccessible and bringing the products of its mines into the public markets and common use was of such public utility as to entitle it to exercise the right of eminent domain in obtaining the access to such coal field that determination was conclusive of the right.

Dillon on Municipal Corporations, sec. 465. And if the Act of the Legislature, determining that the Winifrede Company as a mining and manufacturing company, should exercise the right of eminent domain is subject to review by the courts, its validity has been adjudicated both by the county court of Kanawha county, which took jurisdiction of the condemnation, proceedings instituted under the act by McConihay himself, and rendered judgment therein and also by the court of last resort when it affirmed that judgment.

We insist then that the Winifrede company was in fact only a mining and manufacturing company with the power conferred to exercise the right of eminent domain in obtaining access to its coal fields, and that all of its property whether acquired by purchase or

by condemnation, was subject to the provisions of the act of Feb. 13th, 1837, regulating such companies as amended and confirmed by chapter 56, of the Code of 1849, and could never revert to the former owners, but was assets for the payment of the companies debts.

But supposing the Winifrede Company was a railroad company? The appellants then insists that as it was incorporated between the time the Code of 1849 was enacted (August, 1849,) and the time it went into effect, July 1st, 1850. It is therefore a remarkable and peculiar company, *sui generis*—the *one* railroad company of Virginia that is independent and above all general law, and was never subject to the provisions of the Code of 1849.

To what time does section 1 of chapter 61, of the Code of 1849, relate, when it provides that

"Every company *which is governed* by the Act passed on the "7th day of February, 1847, prescribing certain regulations for "the incorporation of turnpike companies, *or by the act passed* "*on the 11th day of March, 1837*, prescribing certain general reg"ulations for the incorporation of railroad companies and every "company which *after the commencement* of this act shall be in"corporated to construct any work of internal improvement shall "be governed by the provisions contained in the fifty-seventh "chapter, and in this chapter so far as they can apply without "violating its charter."

This section evidently relates to the time it goes into effect, July 1st, 1850, and not to the time it was passed by the Legislature in August, 1849, and its effect is to make every corporation which on the first day of July, 1850, was governed by the railroad act of March 11th, 1837, or the turnpike act of February 7th 1817; and every company incorporated after the 1st day of July, 1850, to construct any work of internal improvement, subject to the provisions of the general law of the Code, when not in conflict with its charter. In other words, to make every such company in the State, then or afterwards created, subject to one general law when not in conflict with special provisions in its charter.

Concede then, for the sake of the argument, that the Winifrede Company was a railroad company, incorporated February 16th, 1850, under the act of March 11th, 1837, and its charter subject to alteration and amendment, as provided in that act; then certainly

the Winifrede Company, on the 1st day of July, 1850, was a corporation governed by the act of March 11th, 1837.

On the said 1st day of July, 1850, a general code of laws goes into effect, which provides that every company governed by the said act of March 11th, 1837, shall be governed by the provisions of certain chapters in that Code, so far as they can apply to such company without violating its charter.

Can there be any doubt that this general law, the moment it went into effect, governed and controlled the Winifrede Company, and the rights of creditors and stockholders to the property it should thereafter acquire?

And under the provisions of this general law there was no forfeiture in any event or under any circumstances for non user but express provision made for securing a just compensation whenever its property was taken. And the said general Code of Laws of 1849, which went into effect as before stated on the 1st day of July, 1850, contains a chapter, the title and 11th and 28th sections of which, are as follows:

TITLE 17.

CORPORATIONS GENERALLY.

CHAPTER LVI.

Of corporations generally; especially of the property a corporation may take and the disposition of it when the corporation is dissolved;

§ 11. The said report and the certificate of the justice shall be forthwith returned to the Court of the county or corporations, and unless good cause be shown against the report, the same shall be confirmed and recorded.

The sum so ascertained to be a just compensation may be paid to the parties entitled thereto or into court.

Upon such payment the title to that part of the land for which such compensation is allowed, shall be absolutely vested in the company, county or town, in fee simple.

SECTION 28. When *any corporation* shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it shall be subject to the payment of debts due by it and then to distribution among the members according to their respective interests; and such corporation, may sue and be sued as before for the purpose of col

lecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property and debts among those entitled thereto.

Here is a chapter in a new Code, a general system of laws, that went into effect on the first day of July 1850; and can there be any doubt that the provisions of this law applied to all corporations public and private throughout the State, including the Winifrede Company, and that the title thereafter acquired by condemnation by any company, town or county was fixed by the terms of this general law? And that the property of *any corporation* including the Winifrede Company, which was so acquired, should upon the expiration or dissolution of the company be subject to the payment of its debts as therein provided?

It is argued by appellants' counsel that because in condemning the property in controversy, the proceedings prescribed in the act of 1837 were adopted, the estate which the company acquired in the property and the disposition to be made of it is not governed and controlled by the Code of 1849.

McConihay himself took the initiative and elected under which act to proceed, and the proceedings under either act were almost identical. They were in the same court and the damages ascertained in the same way, by the same number of freeholders, appointed in the same manner, and a fee ample title vested under both acts.

And the Code of 1879, in providing for the disposition of corporate property and making the same subject to the corporate debts contained no reservations or exceptions depending upon the manner in which the property was acquired, but made "*All its works, and property and debts due it, subject to the payment of debts due by it.*"

It is also argued by appellants' counsel that the failure of the Winifrede Company to use the property for railroad purposes, forfeited its title and the property reverted to the owners independent of any statutes.

But such a reversion never results, when the Company acquires a title in fee simple, instead of a mere Easment, or a right to use only for a specified purpose.

Rorer on Railroads, 414 to 418; Dillon on Municipal Corporations, section 456 and authorities there cided.

And when only an easement or right to use for a specific purpose is acquired, the title does not revert by mere non user but

only by devoting the property to some other use than that for which it was acquired or by complete abandonment and the title to such an easement passes to a purchaser who has a right to continue its use.

In this case, the Winifrede company not only acquired an absolute title in fee simple to the property condemned, but it has never been abandoned or used for any other purpose and the purchaser was attempting, when interrupted by appellants, to devote it to the same purpose for which it wrs originally used by the Winifrede company.

Pittsburg & Lake Erie R. R. Co. vs. Brace, 10th. American and English R. R. cases, page 1 and note thereto pages 11, 12 and 13.

It is also argued by appellant's counsel that in the condemnation of the McConihay land the commissioners offset against the just compensation he would otherwise be entitled to receive, the advantages anticipated from the operation of the road.

That this was not done and could not have been done is fully settled by the case of the James River and Kanawha Company vs. Taner, 9th Leigh., page 313.

We quote from the opinion of Judge Brockenborough (who delivered the prevailing opinion in the case), from pages 333–334 and 335 of the report:

"As the land which is condemned is itself to be valued accord
" ing to quantity and quality and the *inconveniences* to be valued
" are incidental to the condemnation and *local* in their character,
" so it would seem that the *advantages* to be valued, are such as
" are incidental to the condemnation and local in *their* character.

"The advantages are placed in contrast with the inconven
" iences; they are both of like character.

"There may be many such: take for example the cases put by
" counsel.

"The digging of the canal may drain a marsh of the proprietor.
" The walls of the canal may give to the proprietor a line of per
" manent fencing which will save to him a great deal of the ex
" pense of inclosing. There may be others apparent to those who
" go upon the land. Whatever *advantages* the construction of
" the canal gives to him as owner of a particular tract, piece or
" parcel of land on which it is constructed shall be justly re
" garded and shall be combined with the inconveniences for which
" the damages are to be assessed; and the value of these advan
" tages when ascertained may be deducted from the value of the

"land condemned, and of the incident inconveniences * * *
"It is not credible in my opinion that the legislature intended to com-
"pensate the former proprietor for the land taken for public uses by
"the value of the real or supposed advantages to be derived from the
"improved navigation when those same advantages were conferred
"freely on all others without being looked upon as a compensa-
"tion.

The statute receiving construction in the foregoing case was part of the charter of the James River and Kanawha Company, found on page 314 of the report and is couched in the same language as the said 10th section of the Act of March 11th, 1837, except there is added to said 10th section the proviso, "that not less than the "actual value of the land without reference to the location and con-"struction of the road shall be given by the commissioners."

And the above case is cited with approval in 24 Grattan 509, 10th Grattan 19, 21st Grattan 179, and 7th W. Va., 696.

It was not necessary to obtain leave of the court to bring the suit.

The court retained no control over the property, but on the contrary put the purchaser into possession as was its duty upon confirmation and simply retained the title until the purchase money was paid as security for its payment.

Nor was Cram a necessary party to the suit? The court at his suit had sold the property confirmed the sale and directed its commissioner, J. N. Smith, to make a deed when the purchase money was fully paid, (page 12 of record,) and Cram had no further interest in the land and no further connection with it but was simply entitled to his part of the proceeds of sale when collected. He could neither make nor withhold the legal title. The court had provided for all this in the decree of confirmation.

On the question of possession we desire especially to call the attention of the court to the testimony of Col. Swann, on page 76 of record wherein he proves that John McConihay came to his office and executed a paper (recently lost) recognizing Cram's title to the condemned property and agreeing that his (McConihay's) possession of a small portion thereof outside of the inclosure should not bar Cram's right thereto.

Respectfully submitted,

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